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## A COMPARISON OF THE PRINCIPLES OF ILLEGALITY AS DEVELOPED BY THE COURTS AND THE PRINCIPLES OF MALADMINISTRATION AS DEVELOPED BY THE LOCAL OMBUDSMAN

### Thesis

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**A COMPARISON OF THE PRINCIPLES OF ILLEGALITY  
AS DEVELOPED BY THE COURTS**

**AND**

**THE PRINCIPLES OF MALADMINISTRATION  
AS DEVELOPED BY THE LOCAL OMBUDSMAN**

**by**

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**Solicitor of the Supreme Court**

**(H0023745/M/78)**

**Submitted for the degree of Bachelor of Philosophy, March 1977,  
within the discipline of Government and Politics.**

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# **ABSTRACT**

## **A COMPARISON OF THE PRINCIPLES OF ILLEGALITY AS DEVELOPED BY THE COURTS AND THE PRINCIPLES OF MALADMINISTRATION AS DEVELOPED BY THE LOCAL OMBUDSMAN**

submitted for the degree of Bachelor of Philosophy, March 1997,

by

Thomas Ian McLeod LLB BA, Solicitor of the Supreme Court.

This thesis compares the basis on which the courts, operating through the judicial review procedure, hold local authorities' actions and inactions to be unlawful, with the basis on which the local ombudsman (commissioner for local administration) makes findings of maladministration in respect of local authorities.

It begins with an account of the origins, nature and purpose of both judicial review and ombudsmanship, and considers aspects of the procedure by which each operates. It proceeds principally through an examination of the primary sources contained in the law reports and the local ombudsman reports, placing this material within its common law and statutory context.

It concludes that although there are some significant differences between the two avenues of redress, there is a very large degree of overlap in terms of the kind of grievances with which each deals, and the principles which each applies.

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## INTRODUCTION

The office of local ombudsman was created by the Local Government Act 1974 in order to provide an avenue for redress against local authorities who were guilty of maladministration causing injustice, in much the same way as the Parliamentary Commissioner Act 1967 had created the office of Parliamentary Commissioner in order to provide similar redress against central government.

This thesis compares the avenue of redress through the local ombudsman in England and Wales with that provided by the courts by way of judicial review. More particularly, emphasis is placed on the extent to which the grounds for seeking redress are common to both avenues, and, even more particularly, on the extent to which, in practice, the local ombudsman is inhibited by s.26(6)(c) of the Local Government Act 1974, which precludes the local ombudsman from intervening where the complainant has an alternative remedy through the courts, unless the local ombudsman is satisfied that it would not be reasonable to expect the complainant to pursue that remedy.

There is an extensive literature on judicial review and a substantial literature on the office of ombudsman generally, although there is significantly less on the local ombudsman. Furthermore, this literature does not address the specific topic of this thesis. It has not been possible, therefore, to relate the argument of this thesis directly to the existing literature. Instead, the approach adopted is to set out the nature, and functions of, and the grounds for seeking, judicial review, together with a parallel study of the local ombudsman.

The judicial review material is informed principally by the decisions of the courts themselves, supplemented by a number of leading textbooks, including Craig's *Administrative Law*, Wade and Forsyth's *Administrative Law* and de Smith, Woolf and Jowell's *Judicial Review of Administrative Action*, which is widely regarded as the leading textbook in the field. The parallel analysis of the local ombudsman material has been based principally on the local ombudsman's reports themselves, read in the context of the Local Government Act 1974 (as amended) which established the office, together with the *Guide to the Local Government Ombudsman Service* (which although a commercial publication was initially written, and has since been edited, by successive local ombudsmen), and other texts including in particular Seneviratne's *Ombudsmen in the Public Sector* and Logie and Watchman's study of the Scottish context *The Local Ombudsman*. Additionally, reference has been made to the local ombudsman's *Annual Reports* and the *Guidance Notes* which the local ombudsman has issued consequent on the extension of his functions by the Local Government and Housing Act 1989.

The material on local ombudsman reports has been drawn from the reports themselves. These reports are not widely distributed, but since 1988 the journal *Local Government Review* (which was re-titled *Local Government Review Reports* in 1994, and merged into *Justice of the Peace* in 1996) has generally carried one report a week. The present writer has edited these reports throughout this period, in which connexion he has received every local ombudsman report which has been published. Additionally, he edited a selection of the reports which were published in 1993 under the title *Local Government Ombudsman: A Casebook*. Throughout this thesis, therefore, local ombudsman reports are referred to by their official identifier, with additional citations where reports have appeared in the journals and the casebook mentioned above.



The cases on judicial review have been drawn from the primary sources contained in various series of law reports (including *Administrative Law Reports* which has been edited by the present writer since it was established in 1989). Law reports are widely available and access to them therefore presents no problems.

Throughout this thesis, the comparison of redress through the courts and through the local ombudsman proceeds by examining the courts first and then the local ombudsman, since the office of local ombudsman was created on the premise that there were many cases where, in practice, judicial review was an inadequate remedy.

## **CHAPTER 1**

# **THE ORIGINS, PURPOSE AND SCOPE OF JUDICIAL REVIEW AND OMBUDSMANSHIP**

### **A: INTRODUCTION**

This chapter will compare and contrast the origins and purposes of judicial review and ombudsmanship, together with the types of grievance which are susceptible to each mechanism of redress. The grounds on which applications for judicial review, and complaints to the local ombudsman, may be made are considered in outline in chapter 2, and in detail in chapters 3, 4, and 5.

The argument of this chapter is that although the processes of judicial review and ombudsmanship share a concern with the quality of the decision-making process rather than with the content of the decision, there are nevertheless important differences between them in terms of their purpose and scope, as well as - more obviously - their origins.

### **B: THE ORIGINS, PURPOSE AND SCOPE OF JUDICIAL REVIEW**

#### **1. The Origins of Judicial Review**

The 1977 revision of O.53 of the Rules of the Supreme Court introduced a unified procedure to be used for all applications for certiorari, prohibition and mandamus and some applications for injunctions and declarations,<sup>1</sup> and referred to that procedure as an *application for judicial review*. However, the phrase and the relevant remedies all enjoy

much longer pedigrees than this simple statement may suggest.<sup>2</sup> For example, the modern use of *certiorari* can be traced back at least as far as the seventeenth century when it was first used to control the exercise of statutory powers.<sup>3</sup> Furthermore, the phrase *judicial review* has enjoyed wide currency since at least 1959 when the first edition of de Smith's seminal work on *Judicial Review of Administrative Action* was published.<sup>4</sup>

## 2. The Purpose of Judicial Review

In essence, the purpose of judicial review is to control the exercise of governmental powers. It follows that the courts have to resolve - or, at least, maintain equilibrium within - one of the most basic tensions implicit within the British constitution, namely the interaction between the rule of law and the separation of powers (or, as Lord Scarman put it, in *Duport Steels Ltd v. Sirs*,<sup>5</sup> the separation of *functions*). The rapid growth of the use of judicial review in recent years<sup>6</sup> is merely a reflection of the fact that applicants have increasingly argued, and the court has often accepted, that without judicial intervention there will be unacceptable abuses of power. For example in *R. v. Panel on Take-Overs and Mergers ex parte Datafin plc*,<sup>7</sup> where the court was considering the activities of an unincorporated association, which lacked legal personality and which had been created by the City of London for the purposes of its self-regulatory functions in relation to take-overs and mergers, Sir John Donaldson MR spoke of the need for the court to "recognize the realities of executive power".

The fundamental characteristic of judicial review is that it is supervisory rather than appellate. In other words, unlike an appellate body which can generally substitute its

own decision for that against which an appeal is being made,<sup>8</sup> a court which hears an application for judicial review has - at most - the power to quash the decision and remit the matter to the decision-maker for re-consideration. In many cases it will content itself with either a declaration, or even a simple statement that the judgment of the court will itself be sufficient, without the need for any formal order.<sup>9</sup>

The distinction between appeal and review may be basic, but it is nevertheless a matter which the courts frequently feel compelled to emphasise. For example, in *Chief Constable of North Wales Police v. Evans*,<sup>10</sup> which involved a challenge to the exercise of a chief constable's internal disciplinary functions, Lord Brightman commented adversely on the Court of Appeal's approach to the case, saying:

"There is ... a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that 'Not only must [the officer who is subject to the disciplinary proceedings] be given a fair hearing, but the decision itself must be fair and reasonable.' If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, *is not an appeal from a decision, but a review of the manner in which the decision was made*. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself." (Emphasis added.)

In judicial review, therefore, the court is seeking to confine inferior decision-makers<sup>11</sup> within the limits of their lawful authority, whilst seeking to avoid imposing its own view as to the desirable outcome of the decision-making process in terms of the actual decision.<sup>12</sup>

### **3. The Scope of Judicial Review**

#### **(a) Situations Susceptible to Judicial Review**

Judicial review relates to the exercise of powers within the field of public law generally, though the focus of this thesis is on the relationship between judicial review and the rather more limited sphere of responsibility which Parliament has allocated to the local ombudsman.

The reform of O.53 of the Rules of the Supreme Court in 1977 clearly indicated that the uniform procedure which it introduced must be used in applications for certiorari, prohibition and mandamus and could be used in applications for declarations and injunctions.<sup>13</sup> However, in the seminal case of *O'Reilly v. Mackman*,<sup>14</sup> the House of Lords established that, despite the permissive language of O.53 in respect of the use of the judicial review procedure for declarations and injunctions, *all* challenges involving matters of public law must normally be brought by way of judicial review, irrespective of the remedy being sought. Clearly, therefore, the dividing line between *public* and *private* law becomes of crucial importance, and consequently it is not surprising that this has proved to be a fertile field for judicial development.

*In Council of Civil Service Unions v. Minister for the Civil Service*<sup>15</sup> (commonly known as *GCHQ* because the case arose from a ban on trade union membership by workers at the Government Communication Headquarters), Lord Diplock said:

"The subject matter [of an application for judicial review] is a decision ... or else a refusal to make a decision.

"To qualify as a subject for judicial review the decision must have consequences which affect some persons (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage, which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn ...

"For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely ... by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph."<sup>16</sup>

Lord Diplock was not, of course, intending to undermine the basic proposition that some matters are, in their very nature, non-justiciable. Indeed, Lord Roskill made the point expressly, when he said that the right of challenge was not unqualified but

"must depend upon the subject matter of the prerogative power ... Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers, as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."

For some time, the court developed the idea that the key to the distinction between public and private law was whether the decision-making function in question could be said to have a *governmental* quality. For example, in *R. v. Chief Rabbi ex parte Wachmann*,<sup>17</sup> where the issue involved disciplinary action taken by a religious authority (which was ultimately held to be non-justiciable in any event), Simon Brown J said that in order to attract the court's jurisdiction in judicial review,

"there must be not merely a public but potentially a governmental interest in the decision-making power in question ... "

At that time, the case-law indicated that a body's functions were sufficiently governmental for the present purposes provided that, if the body did not already exist, the government would feel compelled to create a body to perform its functions.<sup>18</sup> More recently, however, the court has resiled from this position.

In *R. v. Disciplinary Committee of the Jockey Club ex parte Aga Khan*,<sup>19</sup> the applicant for judicial review was not only a major racehorse owner and breeder, but also the leader of a substantial religious sect. A routine dope test on one of his horses which had won a major race proved to be positive, as a result of which the horse was disqualified and the owner was fined. Even though there was no suggestion that either the owner or the trainer had been responsible for the fact that the horse was doped, the owner felt that the outcome of the disciplinary proceedings reflected adversely on his reputation, as well as involving him in a significant financial loss through the forfeiture of the prize money and the



diminution in the value of the horse. On the owner's application for judicial review, the club took a preliminary point, arguing that it was a private and domestic body, which was independent of government, and that therefore it was not subject to judicial review. The High Court upheld this argument, as did the Court of Appeal.

More particularly, Sir Thomas Bingham MR acknowledged that the club's regulatory functions were of such importance that, but for the club's existence, the government would probably have to create a public body to perform them. Nevertheless, the court held that when viewed from the perspective of its origin, its history, its constitution and its membership, the club could not be said to be a public body, and its powers could not be said to be governmental. The club's jurisdiction over people such as the applicant arose from an agreement between the parties, which gave rise to private rights which were enforceable through the private law remedies of injunctions, declarations and damages. It followed, therefore, that judicial review was not available.

In the same case Hoffmann LJ implicitly acknowledged that, in pursuing the *governmental* test, the courts had been seeking to provide remedies in cases where there was a perceived need for remedies to exist. However, he went on explicitly to reject that approach:

"I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government."

In coming to this conclusion, he treated the slightly earlier decision of the High Court in *R. v. Football Association Ltd. ex parte Football League Ltd*<sup>20</sup> as being "highly persuasive". In that case, which involved a dispute over a proposal to create a Premier League of association football clubs, Rose J said:

"Despite [the Association's] virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only ...

"I do not find this conclusion unwelcome ... [because] ... to apply to the governing body of football ... principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources."

Briefly, therefore, the current position is that judicial review will be available only where the court feels this to be necessary in order to protect the subject. It follows that judicial review will not be available where there are legally enforceable rights in private law; or, to put it another way, judicial review is a remedy of last resort:

## **(b) The Grounds for Applying for Judicial Review**

Moving on from the types of situation in which judicial review will be available, it is necessary to identify the grounds on which applications for judicial review may be made.<sup>21</sup>

The leading, modern, judicial summary may be found by returning to the speech of Lord Diplock in *GCHQ*.<sup>22</sup>

"One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call *illegality*, the second *irrationality*, and the third *procedural impropriety*. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption of the *principle of proportionality* which is recognized in the administrative law of several of our fellow members of the European Economic Community.

"By illegality ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it ... By irrationality I mean what can now be succinctly referred to as *Wednesbury* unreasonableness<sup>23</sup> ... I have described the third head as procedural impropriety rather than as failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in

the legislative instrument by which its jurisdiction is conferred, even though such failure does not involve any denial of natural justice."

By way of consolidation, and before considering the origins, purpose and scope of ombudsmanship (with particular reference, of course, to the local ombudsman), it may be said that judicial review is the modern form of a very long-standing common law jurisdiction, the purpose of which is to control public law decision-making processes which would not otherwise be subject to judicial supervision. However, in the absence of unlawful conduct on the part of the decision-maker, there is no scope for judicial review to operate.

## **D: THE ORIGINS, PURPOSE AND SCOPE OF OMBUDSMANSHIP**

### **1. The Origins of Ombudsmanship**

#### **(a) Generally**

As Logie and Watchman say:

"Ombudsmen are not a particularly new idea nor, for that matter, even an invention of the twentieth century."<sup>24</sup>

More particularly, the office of ombudsman originated in Sweden in 1809, being adopted by Finland and Denmark in 1919 and 1954 respectively, before entering the English-speaking world by way of New Zealand in 1962. The office of the first British ombudsman, the Parliamentary Commissioner for Administration, was created by the Parliamentary Commissioner Act 1967.<sup>25</sup> Further evidence of the international success of the ombudsman concept may be derived from the fact that the European Community Treaty (the Treaty of Rome 1957) as amended by the Treaty on European Union (the Maastricht Treaty 1992) required the creation of an ombudsman for the Community.<sup>26</sup>

### **(b) The Local Ombudsman**

The impetus for extending the ombudsman concept to the field of local government in England and Wales can be traced back to 1969 when para.18 of the report of a committee set up by JUSTICE<sup>27</sup> concluded that

"The case for an Ombudsman or Ombudsmen of some kind is ... we consider, a strong one. What is needed, it is suggested, is an Ombudsman-like institution, to carry out, in relation to local government, functions similar to those carried out in relation to central government by the Parliamentary Commissioner for Administration ... "

In due course, Parliament passed the Local Government Act 1974, Part III of which<sup>28</sup> creates and governs the local ombudsman. The fact that the local ombudsman is a

creature of statute does, of course, contrast fundamentally with the Common Law origins of judicial review, since - when coupled with the public nature of his functions - it means that he is himself subject to the doctrine of *ultra vires*, as developed by the courts through the process of judicial review.

Section 23(1) of the 1974 Act establishes "a body of commissioners to be known as the Commission for Local Administration in England" with corresponding provision for Wales. (Similar legislation established parallel bodies in Scotland and Northern Ireland.) Although the title *local ombudsman* may suggest that he is concerned only with local authorities, s.25(1) of the 1974 Act lists a variety of other bodies, such as Urban Development Corporations and the Land Authority for Wales, which fall within his jurisdiction. The 1974 Act has been subject to significant amendment, especially by the Local Government and Housing Act 1989 in relation to the way in which local authorities must deal with Further Reports.<sup>29</sup>

## **2. The Purpose of Ombudsmanship**

The purpose of ombudsmanship is conceptually quite distinct from that of judicial review, being based upon the concept of *maladministration* rather than *illegality*. The meaning of *maladministration* is considered under the next heading, and the extent to which it overlaps with *illegality* is, of course, the main topic of this thesis,<sup>30</sup> but there can be no doubt that *maladministration* is the wider of the two concepts, since it catches many matters which do not constitute *illegality*. In a Further Report on an investigation into a complaint against Leicester City Council,<sup>31</sup> the local ombudsman criticised the local authority, who had

declined to implement his original recommendation on the basis that the conduct characterised as maladministration fell short of illegality. In a letter to the local authority's chief executive, the local ombudsman said:

"I am not concerned simply with whether acts or omissions are or are not justified by law. *I am also concerned with the area of public morality* ... For my part, I consider that promises should be kept ... " (Emphasis added.)

### **3. The Scope of the Local Ombudsman's Jurisdiction**

#### **(a) Susceptibility to the Local Ombudsman's Jurisdiction**

The basis of the local ombudsman's jurisdiction is contained in s.26(1) of the 1974 Act, the material part of which states:

"Where a written complaint is made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of an authority to which this Part of this Act applies, being action taken in the exercise of administrative functions of that authority, a local commissioner may investigate that complaint."

The next chapter will consider, *inter alia*, the extent to which the existence of an alternative remedy excludes the local ombudsman's jurisdiction,<sup>32</sup> but at this point it is

appropriate to summarize Sch. V to the 1974 Act, which specifically excludes complaints arising from certain types of action:

- (a) the commencement or conduct of legal proceedings;
- (b) action take by a Police Authority in connection with the investigation or prevention of crime;
- (c) action taken in relation to contractual and commercial transactions, including passenger transport, docks and harbours, entertainments, industrial establishments and markets, but excluding the acquisition or disposal of land and certain other statutory functions other than the procurement of goods and services;
- (d) action relating to personnel matters;
- (e) action taken by a local education authority relating to secular or religious instruction in, and the conduct, curriculum, internal management and discipline of, its schools and colleges;<sup>33</sup>
- (f) various actions taken by specialized bodies, such as the Development Board for Rural Wales and Urban Development Corporations.



Since this provision plainly provides that the local ombudsman's jurisdiction is limited to complaints relating to *administrative functions*, it is appropriate to note that in *R. v. Commissioner for Local Administration ex parte Croydon London Borough Council*,<sup>34</sup> Woolf LJ declined to offer a definition of that phrase, contenting himself simply with endorsing the submission of counsel that the statute had been intended to exclude *legislative functions*.

In practice, it is clear that the local ombudsman takes a relatively broad view of the meaning of *administrative functions*, and does become involved into the obscure and unsatisfactory distinctions between judicial, quasi-judicial and administrative functions.<sup>35</sup>

## **2. The Grounds for Complaining to the Local Ombudsman**

Once the local ombudsman has been satisfied as to the basic jurisdictional requirement that the complaint arises out of an administrative function, there remains the question of whether the complainant has sustained injustice in consequence of maladministration.

*Injustice* may be said, according to the current elaboration of the term by the local ombudsman,

"to cover any level of hurt from damaged feelings or a sense of injustice, to loss of or diminution of rights or amenities or damage to property or to loss quantifiable in monetary terms." <sup>36</sup>

An influential statement on the meaning of *maladministration* was given by Richard Crossman, who was the Minister responsible for the Bill which, on becoming the Parliamentary Commissioner Act 1967, created the Parliamentary Commissioner for Administration. Coining what has become known as the "Crossman catalogue" the Minister described *maladministration* as:

"Bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness, and so on."<sup>37</sup>

In the context of the local ombudsman, this statement received explicit judicial approval in Lord Denning MR's judgment in *R. v. Commissioner for Local Administration for the North and East Area of England ex parte City of Bradford Metropolitan Council*.<sup>38</sup>

Although it is clear that the catalogue's closing words - "and so on" - disclose an intention to be indicative rather than definitive, it is also clear that they are not completely open-ended. As Lord Donaldson MR said, in *R. v. Local Commissioner ex parte Eastleigh Borough Council*.<sup>39</sup>

"All three judges [in the *Bradford* case] expressed themselves differently but in substance each was saying the same thing, namely, that *administration* and *maladministration* in the context of the work of local authorities concern the manner in which decisions by the authority are reached and the manner in which they are or are not implemented. *Administration and maladministration have nothing to*

*do with the nature, quality or reasonableness of the decision itself.*"<sup>40</sup> (Emphasis added.)

It is clear, therefore, that despite their totally separate origins, there is a substantial parallel between the jurisdictions of the court and the local ombudsman, with both seeking to divorce consideration of the quality of the decision-making process from consideration of the content of the decision. In reality, both processes achieve this objective to a large extent, although in both cases this proposition is subject to exceptions, in the contexts of *Wednesbury* unreasonableness and perversity or arbitrariness respectively.

However, there are other, more substantial reasons for exercising caution when considering such parallel as there is between the courts and the local ombudsman. As Woolf LJ said in *R. v. Commissioner for Local Administration ex parte Croydon London Borough Council*:<sup>41</sup>

"The Commissioner should also have well in mind, even when the holder of the office is a distinguished lawyer as is the case here, that his expertise is not the same as that of a court of law. Issues as to whether an administrative tribunal has properly understood the relevant law and the legal obligations which it is under when conducting an enquiry are more appropriate for resolution by the High Court than by a Commissioner however eminent."

Furthermore, ombudsman's reports must be read in the light of the ombudsman's function. As Lord Donaldson MR said in the *Eastleigh* case:<sup>42</sup>

"An ombudsman's report is neither a statute nor a judgment. It is a report to the council and to the ratepayers of the area. It has to be written in everyday language and convey a message. This report has been subjected to a microscopic and somewhat legalistic analysis which it was not intended to undergo."

One consequence of this aspect of the local ombudsman's reports is, of course, that the use of "everyday language" is likely to increase the difficulty of formulating precise principles of maladministration.

Even where there is clearly both injustice and maladministration arising from an administrative function, there remains one further, essential element. The local ombudsman's jurisdiction arises only where the injustice is *consequent upon*, and not merely *subsequent to*, the maladministration. This is not only clear from the plain words of s.26(1) of the 1974 Act,<sup>43</sup> but was also emphasized by the Court of Appeal in the *Eastleigh* case,<sup>44</sup> where the local ombudsman investigated a complaint arising out of a local authority's inspection of a sewer during its construction. He concluded that there had been maladministration in the inspection process and that *therefore* householders who were affected by the inadequacy of the sewer had suffered injustice. Although he could not say categorically that even a proper inspection would have revealed the sewer's inadequacy, he nevertheless recommended that certain remedial works should be undertaken, with the cost

being shared between the local authority and the householders. In the High Court, Nolan J found that the local ombudsman's conclusion on causation could not be sustained, and the majority of the Court of Appeal upheld this view.

## **F: CONCLUSION**

It is clear that, despite fundamental differences in their origins, the processes of judicial review and ombudsmanship share the basic characteristic of seeking to assess the quality of the decision-making process without seeking to assess the quality of the ensuing decision, albeit the courts are concerned solely with matters of law, whereas the local ombudsman is concerned with the broader area of public morality. There is a further similarity in that the courts exclude applications for judicial review in respect of certain types of subject-matter, which are said to be non-justiciable, while the 1974 Act excludes from the local ombudsman's jurisdiction complaints arising from certain types of subject-matter.

The next chapter continues the comparison between the two jurisdictions with particular reference to the procedural aspects of each.

<sup>1</sup> See, p.39, n.22, below, for the nature of each of the remedies; and see p.4, above, for the use of O.53 when applying for injunctions and declarations.

<sup>2</sup> See, Drewry, *Judicial Review: the Historical Background*, in Supperstone & Goudie, (eds), *Judicial Review* (1992).

<sup>3</sup> Wade & Forsyth, *Administrative Law*, 7th ed., 1994, p.307.

<sup>4</sup> See, currently, the 5th edition, 1994, by de Smith, Woolf and Jowell.

<sup>5</sup> [1980] 1 All ER 529.

<sup>6</sup> The Report of the Law Commission on *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No 226), published in 1994, gives an increase in applications for leave to apply for judicial review from 525 to 2089 between 1980 and 1991. In the period 1989 to 1995, the *Judicial Statistics* show an increase in applications for leave to apply (apart from those arising from immigration cases and criminal proceedings, neither of which categories is relevant to the present thesis) from 905 to 2063, with an increase in final determination of such applications from 247 to 597.

<sup>7</sup> [1987] 1 All ER 564.

<sup>8</sup> The only exception lies in the field of appeal by way of case stated, where the appellate court may be limited to remitting the case for further consideration by the original decision-maker. This is explicable on the basis that, until the Summary Jurisdiction Act 1857, the remedy of *certiorari* was obtained through appeal by way of case stated - see Wade and Forsyth, *Administrative Law*, 7th ed., 1994, p.731.

<sup>9</sup> In *R. v. Coventry City Council and Others ex parte Phoenix Aviation and Others* (1995) 7 Admin LR 597, Simon Brown LJ described the latter option as "the way we

generally deal with it these days". (This comment does not appear in the report of the case, having been made in the course of the post-judgment discussion between the bar and the bench. Such discussions, which commonly concern the details of matters such as the form of relief, costs and leave to appeal, are very seldom reproduced in law reports.)

<sup>10</sup> *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141.

<sup>11</sup> Such decision-makers are usually administrative in nature, but the historical role of the justices in what is now called local government has resulted in the magistrates' courts also being subject to judicial review.

<sup>12</sup> The extent to which this ideal is attainable in practice is a fruitful field for debate, but it is beyond the scope of this thesis.

<sup>13</sup> Paragraph 1 of O.53, rule 1 provides that "an application for (a) an order of mandamus, prohibition or certiorari, or (b) an injunction under section 30 of the Act restraining a person from acting in any office in which he is not entitled to act, *shall* be made by way of an application for judicial review in accordance with the provisions of this Order." and subrule 2 provides that "an application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) *may* be made by way of an application for judicial review". (Emphasis added.)

<sup>14</sup> [1982] 3 All ER 1124.

<sup>15</sup> [1984] 3 All ER 953.

<sup>16</sup> In all the circumstances of the case, the court declined to intervene, on the bases that the government took the view that the decision had been justified on the grounds of national security, and that political judgments of this nature are non-justiciable, but this

does not detract from the general applicability of Lord Diplock's views. Although the category of non-justiciable matters is never closed, in the same case Lord Roskill gave an indication of some functions which could be so classified, including the use of the Royal Prerogative to enter into treaties, to exercise the prerogative of mercy, to grant honours, to dissolve Parliament and to appoint ministers.

<sup>17</sup> (1991) 3 Admin LR 721.

<sup>18</sup> See, e.g., *R. v. Advertising Standards Authority Ltd ex parte The Insurance Service plc* (1990) 2 Admin LR 77, where decisions of the Advertising Standards Authority were held to be subject to judicial review.

<sup>19</sup> [1993] 2 All ER 853.

<sup>20</sup> (1992) 4 Admin LR 623.

<sup>21</sup> These will be considered in more detail in chapters 3, 4 and 5, below.

<sup>22</sup> See n. 14, above.

<sup>23</sup> The case of *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] 2 All ER 680, with its two doctrines of relevance and reasonableness, is considered in more detail in chapter 3.

<sup>24</sup> *The Local Ombudsman*, 1990, p.7.

<sup>25</sup> The train of events culminating in the passing of the Act is described fully by Stacey, in *The British Ombudsmen*, 1971.

<sup>26</sup> Article 138(e) EC Treaty, inserted by art. G(41) Treaty on European Union.



<sup>27</sup> The committee was chaired by Professor J.F. Garner and is therefore commonly referred to as *the Garner Committee*. The report bore the title of *The Citizen and his Council*.

<sup>28</sup> As amended by the Local Government Acts 1978, 1985 and 1988, the Local Government Administration (Matters Subject to Investigation) Order 1988, and the Local Government and Housing Act 1989.

<sup>29</sup> I.e. reports which are issued when the local ombudsman thinks that local authorities have failed to respond adequately to initial reports. Further Reports are discussed at p.42.

<sup>30</sup> See, more particularly, chapters 3, 4 and 5.

<sup>31</sup> The original report is discussed at p.122, below, where an outline of the facts appears.

<sup>32</sup> See, pp.57 *et seq.*, below.

<sup>33</sup> But the local ombudsman does have jurisdiction to investigate complaints against Appeals Committees established under the Education Act 1980. (Originally, those relating to grant maintained schools were excluded.)

<sup>34</sup> [1989] 1 All ER 1033.

<sup>35</sup> The nature of, and the distinction between, judicial and quasi-judicial decisions were explained in the Report of the *Donoughmore Committee on Ministers' Powers* (1932) thus:

"A *true judicial decision* pre-supposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the

parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

"A *quasi-judicial decision* equally pre-supposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is taken by administrative action, the character of which is determined by the Minister's [*sc.* or other decision-maker's] free choice."

<sup>36</sup> The *Guide to the Local Government Ombudsman Service*, 1.3-01.

<sup>37</sup> HC Deb, Vol 754, c 51, 1966.

<sup>38</sup> [1979] 2 All ER 881.

<sup>39</sup> [1988] 3 WLR 113.

<sup>40</sup> This statement of judicial opinion clearly mirrors s.34(3) of the 1974 Act itself, which provides:

"It is hereby declared that nothing in this Part of this Act authorizes or requires a local commissioner to question the merits of a decision taken without

maladministration by an authority in the exercise of a discretion vested in that authority."

However, where the maladministration takes the form of perversity or arbitrariness, the ombudsman does, in practice, have power to investigate, even though this will often involve a consideration of the quality of the decision and not merely of the decision-making process. See, more particularly, pp.95-98, below.

<sup>41</sup> [1989] 1 All ER 1033.

<sup>42</sup> See n.39, above.

<sup>43</sup> See p.14, above.

<sup>44</sup> See n.39, above.

## **CHAPTER 2**

### **PROCEDURAL ASPECTS OF JUDICIAL REVIEW AND OMBUDSMANSHIP**

#### **A: INTRODUCTION**

This chapter develops the comparison between judicial review and ombudsmanship by examining the procedural aspects of each. The argument is that there are substantial differences in relation to the following matters: the nature of the proceedings (though not, generally, in the standard of proof); controlling and paying for the proceedings; the extent to which the proceedings are held in - and the parties' identities are made - public; and the nature of the remedies. On the other hand, relatively little difference will be seen in relation to certain other matters; namely: the status required to commence each type of proceeding; the attitudes of the courts and the local ombudsman to complainants who delay in making their complaints; the relevance of alternative remedies; and the prescriptive effects of both judicial decisions and local ombudsman's reports.

More particularly, the advantages of the local ombudsman over judicial review will be shown to include the provision of an avenue of complaint which is both free (as far as complainants are concerned) and private, although in the comparatively small minority of cases in which local authorities refuse to accept local ombudsmen's reports, complainants are likely to regard the lack of enforceable remedies as being a shortcoming when compared with judicial review.<sup>1</sup>

## **B: THE NATURE OF THE PROCEEDINGS AND THE STANDARD OF PROOF**

### **1. Judicial Review**

#### **(a) The Nature of the Proceedings**

As is usually the case in English courts, the procedure by way of judicial review is essentially adversarial. More particularly, this means that the law will impose a burden of proof on one of the parties, and that party will not succeed without producing sufficient evidence to displace that burden.<sup>2</sup> However, in the context of judicial review, the potential consequences of the adversarial nature of the procedure are somewhat mitigated by the court's requirement of good faith on the part of both applicants and respondents.

For example, in *R. v. Secretary of State for the Home Department ex parte Mannan*<sup>3</sup> an applicant for judicial review failed to disclose that representations had been made on his behalf to the Minister of State, and that a Member of Parliament had made inquiries on his behalf. Nolan J emphasized that it was of the greatest importance that all the facts were disclosed and the applicant's counsel agreed that the application could not continue.

The applicant's obligation of disclosure is counterbalanced by the court's high expectation of respondents. This may be broken down into two elements, as Lord Donaldson MR made plain in *R. v. Civil Service Appeal Board ex parte Cunningham*,<sup>4</sup> where he returned to a theme he had introduced in *R. v. Lancashire County Council ex parte Huddleston*.<sup>5</sup>

"In [*Huddleston*] I expressed the view that we had now reached the position in the development of judicial review at which public bodies and the courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration, including, I would add, the administration of justice. It followed from this that if leave to apply for judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice, and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to. Parker LJ and Sir George Waller did not share my unease at the limited disclosure made by the council in that case, but I do not understand them to have disagreed with the principle."

The first expectation - to provide sufficient information to enable the court to do justice - requires no further comment; but the second, and more particular, expectation that reasons will be provided when the case is before the court must be rigorously distinguished from the lack of any general requirement that reasons shall be given for decisions.<sup>6</sup>

#### **(b) The Standard of Proof**

Whether judicial review proceedings are civil or criminal depends on whether the decision-making process which is being challenged arose in a civil or a criminal context, but those situations which are likely to be comparable with those which might prompt a complaint to the local ombudsman will almost invariably be civil. For the purposes of the

argument of this thesis, therefore, it can be said that the burden on the applicant is to prove his case on the balance of probabilities.<sup>7</sup>

### **(c) The Possibility of an Appeal**

Appeal in relation to applications for judicial review arising from civil cases lies to the Court of Appeal, and in applications arising from criminal cases to the House of Lords.<sup>8</sup>

## **2. The Local Ombudsman**

### **(a) The Nature of the Proceedings**

A person seeking judicial review is an applicant, while one seeking redress through the local ombudsman is a complainant. Unlike an applicant for judicial review who is required to prove his case, a complainant to the local ombudsman is required only to show that he has a complaint worthy of investigation. It is for the local ombudsman to decide whether, on the face of it, the complaint does fall into this category. If it does so, he will take upon himself the task of collecting and evaluating the evidence.

The minimal extent of the complainant's involvement in initiating the local ombudsman procedure was explained in the *Bradford* case,<sup>9</sup> where Lord Denning MR said:

"If the commissioner looking at the case with all his experience can say 'it looks to me as if there was maladministration somewhere along the line and not merely an erroneous decision' - then he is entitled to investigate it. It would be putting too

heavy a burden on the complainant to make him specify the maladministration, since he has no knowledge of what took place behind the closed doors of the administrator's office ... suffice it that [the complainant] specifies the action of the local authority in connection with which he complains there was maladministration."

The basic provisions governing investigations are contained in s.28(1) and (2):

"(1) Where a local commissioner proposes to conduct an investigation pursuant to a complaint, he shall afford to the authority concerned, and to any person who is alleged in the complaint to have taken or authorized the action complained of, an opportunity to comment on any allegations contained in the complaint.

"(2) Every such investigation shall be conducted in private, but except as aforesaid the procedure for conducting an investigation shall be such as the local commissioner considers appropriate in the circumstances of the case; and without prejudice to the generality of the preceding provision the local commissioner may obtain information from such persons and in such manner, and may make such inquiries, as he thinks fit, and may determine whether any person may be represented (by counsel or solicitor, or otherwise) in the investigation."

One important consequence of the inquisitorial nature of the proceedings is that it is the ombudsman himself who is in control throughout. However, this aspect is so



closely connected with the financial aspects of the applications for judicial review and local ombudsman investigations that both will be discussed together under the next heading.

### **(b) The Standard of Proof**

The outcome of many local ombudsman's investigations turns on conflicts of evidence, particularly in relation to what was said, or not said, and whether communications in writing were received.<sup>10</sup> The local ombudsman resolves such conflicts in the light of the evidence and on the balance of probabilities.

### **(c) The Possibility of an Appeal**

There is no appeal against the local ombudsman's findings.

## **3. Conclusion**

The distinction between the adversarial nature of judicial review and the inquisitorial nature of the local ombudsman's procedure is fundamental (with some important aspects of the distinction being discussed under the next heading).

There is a clear distinction between the jurisdictions of the courts and the local ombudsman in respect of the availability of an appeal against the decisions of the former but not the latter.

However, in practical terms<sup>11</sup> the standard of the proof - i.e. the balance of probabilities - is the same in both contexts.

## **C: CONTROLLING AND PAYING FOR THE PROCEEDINGS**

### **1. Judicial Review**

Applications for judicial review involve the payment of court fees and are subject to the normal principles of costs, which means that the unsuccessful party is usually ordered to pay the legal costs of the successful party. The parties are very largely in control of the proceedings, at least in terms of the evidence which they propose to adduce (or not, as the case may be), and the court may compel reluctant witnesses to give evidence and produce documents. Witnesses who attend, whether reluctantly or not, are entitled to receive payment in respect of matters such as subsistence, loss of earnings, and travelling expenses, although in practice evidence is commonly given by affidavit without the need for personal attendance.

### **2. The Local Ombudsman**

Section 29(1) (2) (3) (4) (5) and (7) of the 1974 Act confers upon the local ombudsman powers of compulsion which are broadly speaking the same as those enjoyed by the courts.

More particularly, subs.(1) provides that

"a local commissioner may require any member or officer of the authority concerned, or any other person who in his opinion is able to furnish information or

produce documents relevant to the investigation, to furnish any such information or produce any such documents".

Subsection (2) provides that

"a local commissioner shall have the same powers as the High Court in respect of the attendance and examination of witnesses, and in respect of the production of documents".

Subsection (3) provides that

"a local commissioner may ... require any person<sup>12</sup> to furnish information concerning communications between the authority concerned and any government department, or to produce any correspondence or other documents forming part of any such written communication."<sup>13</sup>

The subsection also gives the local commissioner power to pay expenses and compensation for loss of time to complainants and anyone else who attends, or provides information for, an investigation.

Subsection (4) provides that neither legal duties of secrecy nor Crown Privilege<sup>14</sup> shall apply to information required under subs.(3), although subs.(7) provides that this does not extend to compelling the giving of evidence or the production of documents except where such compulsion would be available in civil proceedings in the High Court.

Subsection (6) enables the local ombudsman to obtain and pay for "advice from any person who in his opinion is qualified to give it", thus reinforcing the point that it is the local ombudsman and not the complainant who is in control of the investigation.

Subsection (8) provides that

"if any person without lawful authority or excuse obstructs a local commissioner in the performance of his functions under this Part of this Act, or any officer of the Commission assisting in the performance of those functions, or is guilty of any act or omission in relation to an investigation under this Part of this Act which, if the investigation were a proceeding in the High Court, would constitute contempt of court, the local commissioner may certify the offence to the High Court."

Subsection (9) gives the High Court power to deal with offences which the local commissioner has certified under subs.(8).

Although the combined effect of subs.(8) and (9) is to create what might be termed, by analogy with the established concept of contempt of court, "contempt of the local ombudsman", it is important to notice that, unlike the court, the local ombudsman has no powers of enforcement.<sup>15</sup> This is, of course, no more than a specific illustration of his general status of having powers without sanctions.

Subsection (4) provides:

"The conduct of an investigation under this Part of this Act shall not affect any action taken by the authority concerned, or any power or duty of that authority to take further action with respect to any matters subject to the investigation."

Although this provision appears to be no more than an aspect of the principle that the local ombudsman is concerned with the decision-making process rather than the decision itself, the local ombudsman has added a gloss to it by holding that the fact of a complaint to the local ombudsman does not justify a delay in making a report to a committee if such a report would normally be made.<sup>16</sup>

The cost of the local ombudsman service is met by top-slicing the Revenue Support Grant, with complainants incurring no financial liability. The local ombudsman may recommend that the local authority should reimburse legal or other costs which a complainant has incurred in connection with the complaint, but if the complaint is dismissed the complainant is not required to pay the local authority's costs of dealing with the local ombudsman's investigation.

### **(c) Conclusion**

Judicial review and ombudsmanship are essentially different in terms of controlling and paying for the respective processes. In judicial review the applicant has to present his case, supported by relevant and admissible evidence, whereas in ombudsmanship the active involvement of the complainant ceases when the complaint has been made. Furthermore, the applicant for judicial review incurs fees and may be responsible for the costs of the

application, whereas the complainant to the local ombudsman incurs no financial liability whatever.

## **D: PUBLICITY AND ANONYMITY**

### **1. Judicial Review**

Since open justice is commonly perceived to be an essential foundation of liberal democracy, it is not surprising that the court's jurisdiction in judicial review is generally administered in public, and that the names of the parties will generally be public knowledge.<sup>17</sup> The basic nature of the principle of open justice is clear from the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6(1) of the Convention recognises the right "to a fair and public hearing" in relation to both civil and criminal proceedings, while accepting derogations from the principle of openness

"in the interest of morals, public order or national security ... [and]... where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary ... in special circumstances where publicity would prejudice the interests of justice."<sup>18</sup>

### **2. The Local Ombudsman**

By way of contrast with the general practice of public proceedings in court, the local ombudsman's usual practice is to preserve, so far as public knowledge is concerned, the

anonymity of everyone concerned, apart from the local authority. The only exception to this practice arises from the application of s.32 of the Local Government and Housing Act 1989, which, by way of amendment to the 1974 Act, requires the local ombudsman to name any member of a local authority whose action constituted maladministration and also constituted a breach of the *National Code of Local Government Conduct*,<sup>19</sup> unless he is satisfied that it would be unjust to do so.

The basic provisions governing publicity for reports are contained in s.30 of the 1974 Act, which provides that a report of the result of an investigation (or of a decision not to conduct one, as the case may be) must be sent to the complainant, to the member (if any) who referred the complaint to the local ombudsman,<sup>20</sup> and to the person or body whose conduct is alleged to have constituted maladministration. The section also requires that a copy of the report shall be available for inspection at the offices of the local authority, and that notice of its availability shall be given in a newspaper circulating in the area. Copies of the report must also be made available at reasonable cost. The same principles apply to Further Reports.<sup>21</sup>

### **3. Conclusion**

The local ombudsman's investigations are conducted, and his reports are written, in such a way as to preserve the anonymity of the individuals concerned as far as practicable, except where there has been a breach of the Code of Conduct, when identifications may be made. By way of contrast, applications for judicial review, in common with almost all court proceedings are held in public, and may be fully reported.

## **E: THE NATURE OF THE REMEDIES**

### **1. Judicial Review**

The remedies available by way of judicial review are certiorari, prohibition, mandamus, injunctions and declarations,<sup>22</sup> and all except declarations are enforceable<sup>23</sup> by way of contempt of court.<sup>24</sup> Additionally, O.53 r.7 of the Rules of the Supreme Court and s.31(4) of the Supreme Court Act 1981 both provide that claims for damages may be joined in with an application for judicial review. However, it is important to note that the possibility of claiming damages in an application for judicial review is purely procedural. In other words, an applicant for judicial review who also has a claim for damages against the respondent, may combine both matters within a single set of proceedings, rather than having to institute and maintain two separate actions; but the rule and the section do not create any right of action for damages where none exists independently of those provisions. The question, therefore, is: when, if at all, does a breach of public law give rise to an action in damages? The House of Lords provided an authoritative survey of the case law on this topic in *X and Others (Minors) v. Bedfordshire County Council (and Other Cases)*,<sup>25</sup> where a variety of claims were made in either negligence or breach of statutory duty.

The House of Lords held that claims for damages against public authorities fall into four categories, namely actions for breach of statutory duty *simpliciter* (i.e. irrespective of carelessness); actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action; actions based on a common law duty of care arising either from the imposition of a statutory duty or from the



performance of it; and (although this did not arise in any of the instant cases) misfeasance in a public office (i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff, or in the knowledge that the conduct is unlawful).

Analysing these categories in more detail, the House said that where the action is for breach of statutory duty *simpliciter*, it is necessary to show not only that there has been a breach of duty but also that, as a matter of construction of the statute, the duty was imposed for the protection of a limited class of the public, and Parliament intended to confer upon members of that class a private law right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action, but if the statute indicates a Parliamentary intention to protect a limited class, without the corresponding provision of a means of enforcing that protection, there may be a private law right of action, because otherwise there will be no means of securing the protection which the statute was intended to confer. However, the question is always a matter of the construction of a specific statute, and therefore it does not follow that the provision of a specific means of enforcement will necessarily lead to the conclusion that no private law right of action can also exist.

Where the action is based solely on the careless performance of a statutory duty in the absence of any other common law right of action, it is necessary to show that the circumstances are such that the defendant owes the plaintiff a duty of care at common law, as well as the duty imposed by the statute. In determining whether there is a duty of care at common law in relation to cases arising out of policy matters, it is necessary to recall that the formulation of policy is within the remit of the decision-maker to whom that function

has been allocated, and therefore unless the formulation of the policy in question is so unreasonable that it can be said that the decision-maker has exceeded its remit, it follows that the subject-matter of the claim is non-justiciable. However, assuming that the subject-matter of the complaint is justiciable, it remains necessary for the plaintiff to establish that he was owed a duty of care in accordance with the ordinary principles of negligence, namely reasonable foreseeability of damage, proximity of the parties, and that it would be fair, just and reasonable to impose the duty in question.

If damages are awarded, their payment is, of course, enforceable by judicial process.

## **2. The Local Ombudsman**

The range of recommendations which the local ombudsman makes in practice is as varied as the types of maladministration and injustice which he identifies, but typical examples include making recommendations to the effect that people should be given priority on housing waiting lists, or should receive compensation in respect of abortive expenditure, or should receive payment in respect of their time and trouble in pursuing the complaint.

Decisions to recommend financial payments are clearly not in any way dependent on legal liability.

In common with all other public sector ombudsmen in England, Wales and Scotland,<sup>26</sup> the local ombudsman has no power to enforce his recommendations.<sup>27</sup> It follows that compliance with local ombudsman's recommendations is a matter of conscience on the part of the local authority, which may, of course, be conditioned by

public opinion. It is worth noticing, therefore, that there are statutory provisions which are designed to encourage the operation of both these elements.

In addition to the basic requirements in relation to the publicity to be accorded to ordinary reports,<sup>28</sup> s.31(2) of the 1974 Act<sup>29</sup> provides that a local authority must consider a report in which the local ombudsman has found maladministration causing injustice, within three months (or such longer period as the local ombudsman may agree), and tell the local ombudsman what action it has taken, or proposes to take, in response to the report.

The local ombudsman has always had power to issue Further Reports if he is not satisfied with the response to an initial report, but the current version of the statutory scheme, including the amendments introduced by the Local Government and Housing Act 1989, provides that a decision to reject a Further Report must be preceded by consideration of a report from an independent person who was not involved in the maladministration,<sup>30</sup> and can be taken only by a meeting of the full council (i.e. not by a committee).<sup>31</sup> If a local authority does decide not to comply with a local ombudsman's recommendation, the ombudsman can require it to publicise his finding. According to para. 405 of the *Report of the Financial Management and Policy Review of the Commission for Local Administration*, the cost of such publicity can be of the order of £6,000, which leads to the conclusion that

"some authorities would rather publish the required statements than pay quite small amounts of compensation - it appears to be the principle that counts."

In the event of failure to comply with such a requirement, the local ombudsman can publicise the matter himself and the local authority will be responsible for his expenditure.<sup>32</sup>

These amendments appear to have had a significant effect in reducing the number of unsatisfactory responses to Further Reports, as the *Table of Outcomes of Further Reports (Compiled From the Annual Reports for 1989-90 to 1995-96)* shows.<sup>33</sup>

### **3. Conclusion**

There are significant differences between judicial review and the local ombudsman in terms of the remedies which are available. More particularly, any order of the court apart from a declaration - will be enforceable by way of contempt of court, whereas there is no enforcement mechanism associated with the local ombudsman's recommendations for redress.

## **F: THE STATUS REQUIRED TO APPLY FOR JUDICIAL REVIEW OR TO COMPLAIN TO THE LOCAL OMBUDSMAN**

### **1. The Status Required to Apply for Judicial Review**

Order 53 of the Rules of the Supreme Court and s.31 of the Supreme Court Act 1981, provide that in order to have the standing which is necessary to apply for judicial review, the applicant must have a "sufficient interest" in the subject-matter of the application.

"Sufficient interest" is not specifically defined, but before the reform of O.53 in 1977 a

substantial body of case-law had developed in relation to *locus standi*, with different criteria being applied in respect of each of the remedies.

It is not immediately apparent from either O.53 or s.31 whether the new terminology was intended to indicate that there is a single test for identifying *locus standi*. Nevertheless, it can clearly be argued that the use of a single form of words to state the test was intended to reflect the introduction of a single test, at least to the extent of abolishing the old technicalities under which the requirement of standing had varied according to the remedy which was being sought; and in *R. v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd*<sup>34</sup> (also known as the *Fleet Street Casuals* case, because it involved casual workers on national newspapers which were then concentrated in Fleet Street), a majority of the House of Lords (Lords Diplock, Scarman and Roskill, joined with some uncertainty by Lord Fraser) indicated that this was in fact the position.

The Court of Appeal has emphasized the fundamental nature of the requirement of *locus standi* by saying that it goes to the jurisdiction of the court. It follows therefore that the parties cannot simply agree between themselves that *locus standi* will not be put in issue, since this could have the effect of conferring upon the court a jurisdiction which it may not properly have.<sup>35</sup> In reality, however, the general trend of judicial decision-making has been to accord *locus standi* on a generous basis. For example, in both *R. v. Greater London Council ex parte Blackburn*<sup>36</sup> and *R. v. Hereford Corporation ex parte Harrower*,<sup>37</sup> ratepayers were held to have *locus standi* to challenge decisions of local authorities.<sup>38</sup>

Additionally, the courts have continued the trend, which has already been illustrated by the cases involving the National Federation of Self-Employed and Small Businesses Ltd and the Child Poverty Action Group, of according *locus standi* to public interest bodies and pressure groups<sup>39</sup>. In adopting a relaxed attitude, the courts seem to be accepting the reality that, in the words of de Smith, Woolf and Jowell,<sup>40</sup>

"it is possible for there to be situations where there are persons who are directly affected by administrative action who are for reasons of poverty, ignorance or lack of an incentive incapable of bringing proceedings. There are other situations where if a public interest body or pressure group are not in the position to bring proceedings nobody would be in a position to do so, as no individual is affected to a greater extent than any other individual. In such situations an appropriate body or, if necessary, an appropriate individual should be regarded by the court as having the necessary standing."

It is clear that a member of a local authority may apply for judicial review in respect of a decision of his own authority.<sup>41</sup> This may not seem startling but is nevertheless worth mentioning in order to pave the way for a contrast with the local ombudsman context.

## **2. The Status Required to Complain to the Local Ombudsman**

Turning to the local ombudsman, s.26(1) of the 1974 Act refers to a complaint being

"made by or on behalf of a member of the public who claims to have sustained injustice ... "

The scope of this provision is clarified by s.27 which provides:

"(1) A complaint under this part of this Act may be made by an individual, or by any body of persons whether incorporated or not, not being:

(a) a local authority or other authority or body constituted for purposes of the public service or of local government, or for the purposes of carrying on under national ownership any industry or undertaking or part of any industry or undertaking;

(b) any other authority or body whose members are appointed by Her Majesty or any Minister of the Crown or government department, or whose revenues consist wholly or mainly of moneys provided by Parliament.

"(2) Where the person by whom a complaint might have been made under the preceding provisions of this Part of this Act has died or is for any reason unable to act for himself, the complaint may be made by his personal representative or by a member of his family or by some body or individual suitable to represent him; but

except as aforesaid a complaint shall not be entertained under this Part of this Act unless made by the person aggrieved himself."<sup>42</sup>

The generality of this provision is, however, restricted by s.26(7), which excludes complaints that, in the opinion of the local ombudsman, affect all, or most, of the inhabitants of the local authority's area.

Sections 26 and 27 make no provision as to whether members and officers can be regarded as members of the public for the present purposes. The *Guide to the Local Government Ombudsman Service* deals with the question thus:<sup>43</sup>

"Councillors and officers can be members of the public when they are not complaining in their official role; e.g. if a councillor is complaining about delay in carrying out repairs to his council house he is complaining as a member of the public. If, however, he is complaining that he was not allowed to speak in a debate or not being given information he requires as a councillor he is not complaining as a member of the public. It is possible, however, that a member of the public could make a similar complaint, i.e. that he had suffered injustice because his councillor had been denied something."

On the other hand, it has been argued,<sup>44</sup> that the phrase "person aggrieved" should be given its ordinary meaning. The argument is based on an analogy with *Cook v. Southend Borough Council*,<sup>45</sup> where the Court of Appeal held that a local authority which



had revoked certain hackney carriage licences was a person aggrieved by, and therefore had a right of appeal to the Crown Court against, a decision of a magistrates' court to allow an appeal against the revocation.<sup>46</sup> If this argument were correct, it would follow, for example, that a councillor who does not receive prompt replies to correspondence with officers would be able to complain to the local ombudsman. However, it is submitted that the argument is plainly wrong.

First, it overlooks one of the most basic principles of statutory interpretation:

"No real help can be gained as to the meaning of a word in statute A by reference to its meaning in statutes B, C, or D. All one can derive from the cases are the relevant principles of construction to be applied."<sup>47</sup>

Secondly, it is plain that the purpose<sup>48</sup> of the local ombudsman legislation is to provide remedies against administrative errors of various sorts, rather than to provide elected politicians with weapons against their own bureaucracy. Judicial authorities drawn from the realm of hackney carriage licensing are, therefore, nothing to the point when interpreting the statutory provisions governing the local ombudsman.

### **3. Conclusion**

Although the status required to apply for judicial review is formulated differently from that required to complain to the local ombudsman (*sufficient interest* rather than *person aggrieved*) in practice the two requirements operate in very similar ways. In particular, the

courts are increasingly willing to accord *locus standi* to public interest bodies and pressure groups, thus reflecting the statutory provision<sup>49</sup> which enables "any body of persons whether incorporated or not" to complain to the local ombudsman. However, although a member may seek judicial review in respect of a decision of his own authority, there appears to be no corresponding right to complain to the local ombudsman.

## **G: TIME LIMITS AND DELAY**

### **1. Judicial Review**

The normal maximum time limit within which application for judicial review must be made is three months, and in some situations promptness may require even more timeous application. However, this brief statement glosses over certain differences of wording between O.53, r.4, and s.31(6) of the 1981 Act.

Order 53, r.4 provides:

"An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period."

Section 31(6) provides:

"Where the High Court considers that there has been undue delay ... the court may refuse to grant (a) leave for the making of the application; or (b) any relief sought

on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration."

The leading case on the relationship between O.53 and s.31 is *R. v. Dairy Produce Quota Tribunal for England & Wales ex parte Caswell and Caswell*,<sup>50</sup> which involved challenging the allocation of milk production quotas over a number of years. The House of Lords said that the relationship between s.31 and O.53 is that the former specifies particular grounds for refusing to grant either leave or substantive relief as the case may be, without limiting, in the words of r.4(3), "the time within which an application for judicial review may be made".

Consequently, the grant of an extension of time does not mean that the delay ceases to be undue, and does not therefore prevent the refusal of substantive relief in the exercise of the court's discretion under s.31(6), to which the court is bound to give effect independently of any rule of court.

Furthermore, although the importance of finality may vary between one context and another, it would be unwise to formulate any precise definition of "detriment to good administration", s.31(6) recognizes that the interests of good administration are independent of hardship or prejudice to the rights of third parties; and good administration requires, *inter alia*, a regular flow of consistent decisions, made and published with reasonable dispatch, so that citizens may know where they stand and how they can order their affairs.

Finally, the harm suffered by the applicant is relevant to the exercise of discretion under s.31(6), although in the present case this did not prevail over the detriment to good administration which would ensue from re-opening a decision to allocate a finite quota among various recipients over a number of years.

## **2. The Local Ombudsman**

Section 26(4) of the 1974 Act generally precludes the investigation of a complaint unless it is made to either the local ombudsman or a member of the authority concerned

"within twelve months from the day on which the aggrieved person first had notice of the matters alleged in the complaint"

but proceeds to give the local ombudsman a discretion to investigate complaints made outside the time limit "if he considers it reasonable" to do so.

The case-law has reinforced the discretion available to the local ombudsman. In the *Bradford* case,<sup>51</sup> Lord Denning MR summarized the prevailing judicial view thus:

"The modern approach to time bars whether under statutes or the Hague Rules<sup>52</sup> or such like ... [is that they] ... are not to be enforced rigidly against a complainant where justice requires that the time be extended and his complaint heard."

The *Guide to the Local Government Ombudsman Service* states the attitude of the commissioners themselves to complaints which are made out-of-time thus:<sup>53</sup>

"As general guidelines the following types of matter would make it reasonable for discretion to be exercised (whilst not creating a closed list) but the further away from the twelve month period the date is when the complainant had notice of the matters complained of, the more critical the commissioner will be:

- complainant ill or otherwise unable to act;
- complainant trying to get the matter settled locally;
- complainant tried to contact the commissioner but used the wrong route, e.g. via MP;
- complainant, because of his own particular circumstances (e.g. an inarticulate person with particular problems at the time) was ignorant of the existence of the commissioner;
- complainant had good reasons to suppose that his complaint was about to be settled locally."

### **3. Conclusion**

Both the courts and the local ombudsman exhibit a degree of flexibility in the way in which they operate the principles of their respective schemes in relation to delay. However, a problem arises when trying to compare the two regimes in operation. In an application for

judicial review, the relevance of any delay will be an issue between the parties, and the decisions of the courts are made in public whichever party is successful, so that both decisions where time has and has not been extended enter the public domain. On the other hand, it is in the nature of ombudsmanship that where the time limit is held to operate against a complainant there will be no investigation, which means that the only reports which are available relate to cases in which delay has been held to be excusable.

## **H: THE RELEVANCE OF ALTERNATIVE REMEDIES**

### **1. The Relevance of an Alternative Remedy in Relation to Judicial Review**

The availability of an alternative remedy is often said to justify the courts in declining to grant judicial review. In *R. v. Peterkin ex parte Soni*<sup>34</sup> Lord Widgery CJ explained the reasoning thus:

"Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains, this court should in my judgment as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and commonsense seem to me to demand that the court should not allow its jurisdiction

under the prerogative orders to be used merely as an alternative form of appeal [*sic*] when other and adequate jurisdiction exists elsewhere."

In *R. v. Birmingham City Council ex parte Ferrero Ltd*,<sup>55</sup> Taylor LJ emphasized that the nature of the statutory appeal in question was crucial when he said:

"Where there is an alternative remedy, and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case."<sup>56</sup>

The court will be particularly alert to require the use of a statutory appeal where, in practice, there will be a substantial delay before an application for judicial review is likely to be heard, especially in cases where the delay may prejudice vulnerable people.<sup>57</sup>

The presumption that the existence of an alternative remedy excludes recourse to judicial review becomes irrebuttable in those cases where both the alternative remedy, and the right which it enforces, are created simultaneously. The classic case is *Barracough v. Brown*,<sup>58</sup> where the undertakers who were responsible for a waterway had a statutory power to remove any boat which sank, and to sell it. If the proceeds of sale were less than the cost of removal, the same statute gave the undertakers a specific power to recover the balance in the magistrates' court. In the instant case the undertakers wanted to recover £3,000. This sum being very substantially more than those which normally came within the

jurisdiction of the magistrates, the undertakers brought the action in the High Court. The court held that the only remedy was in the magistrates' court, because the power to remove and sell the wreck, and the power to recover the cost, were both given by the same Act. It followed that undertakers seeking to avail themselves of the power of recovery must do so in accordance with the Act.

However, the principle in *Barraclough v. Brown* is applied strictly, as the decision of the House of Lords in *Pyx Granite v. Minister of Housing and Local Government*<sup>99</sup> shows. The company claimed the right to quarry in the Malvern Hills under a private Act of Parliament passed in 1924. The statutory scheme of planning control introduced by the Town and Country Planning Act 1947 not only defined those situation which would constitute "development" needing planning permission, but also provided administrative machinery for doubtful cases, whereby local planning authorities could issue determinations as to whether specific proposals would constitute development. The question arose as to whether the company required planning permission, or whether they could rely on their rights under the 1924 Act rights.

The House of Lords distinguished *Barraclough v. Brown* on the basis that in the instant case the right which the company was seeking to enforce existed independently of, rather than having been conferred by, the Act which provided the specific remedy. It followed that the courts could determine the question of whether their proposals constituted development, and that the company was not restricted to the machinery provided by the 1947 Act.



There may be other cases where the availability of an alternative remedy is not conclusive. In *R. v. Hillingdon London Borough Council ex parte Royco Homes Ltd*,<sup>60</sup> the issue was whether the company could challenge a local planning authority's decision directly in the High Court, or whether it must first pursue an appeal to the Secretary of State, from whose decision there would then be a statutory right of appeal on a point of law to the High Court. The High Court held that direct access to the courts was permissible in cases such as this, notwithstanding the alternative remedy of an appeal to the Secretary of State, provided that the ground of challenge was simply an issue of law. In other cases, however, such as those where issues of fact, law and planning policy are all intertwined, the statutory avenue to the Secretary of State would be more appropriate, because this would enable all the issues arising out of the case as a whole to be considered together, whereas the court would be restricted to considering the legal issues in isolation.

In *R. v. Lambeth London Borough Council ex parte Crookes*,<sup>61</sup> Sir Louis Blom-Cooper QC, sitting as a Deputy Judge of the High Court, said that a court dealing with an application for judicial review should regard the local ombudsman as an alternative remedy (and should therefore decline to proceed) where the substance of the complaint falls within the definition of maladministration, but not where it amounts to illegality, proportionality or irrationality.<sup>62</sup>

One recurrent problem in judicial review is whether defendants wishing to raise matters of public law by way of defence to legal proceedings should be allowed to do so, or whether their failure to apply for judicial review in the first place will result in their being held to have forfeited their right to complain. The current solution to this problem, which

involves drawing a distinction between civil and criminal proceedings is clear, if not altogether satisfactory.<sup>63</sup> As far as civil proceedings are concerned, the leading cases are *Wandsworth London Borough Council v. Winder*<sup>64</sup> and *Avon County Council v. Buscott*.<sup>65</sup> In *Winder* a tenant was allowed to resist proceedings for arrears of rent and re-possession on the basis that the sum claimed related only to an increase which he alleged to be *ultra vires*, with the result that the sum was not *lawfully* due at all. In *Buscott*, on the other hand, gypsies who acknowledged they were trespassing on certain land, were not allowed to argue, by way of defence to possession proceedings in respect of the land, that the decision to bring the proceedings against them contravened the *Wednesbury* principle.<sup>66</sup>

## **2. The Relevance of an Alternative Remedy in Relation to the Local Ombudsman**

The first point to be made when considering the extent to which the existence of an alternative remedy excludes the local ombudsman from intervening is that s.26(5) of the 1974 Act prohibits the local ombudsman from entertaining a complaint unless he has satisfied himself that the local authority has had "a reasonable opportunity to investigate, and reply to, the complaint."

Section 26(6) proceeds to set out a number of more detailed exclusions, which generally preclude investigations in respect of

"(a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment;

"(b) any action in respect of which the person aggrieved has or had a right of appeal to a Minister of the Crown; or

"(c) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law."<sup>67</sup>

The generality of these provisions is, however, modified by a proviso to the section which gives the local ombudsman a discretion to

"conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or to have resorted to it."<sup>68</sup>

According to the *Guide to the Local Government Ombudsman Service*,<sup>69</sup> "the ability to defend action brought by the authority is not such a remedy". This view has not been tested in the courts, but presumably when deciding whether there is an ability to defend an action, it would be necessary to bear in mind the distinction drawn in *Avon County Council v. Buscott* between that case and *Wandsworth London Borough Council v. Winder*.<sup>70</sup>

More generally, in August 1976, the Commission formulated the following guidelines for the exercise of the discretion conferred by the proviso in cases where the complainant has or had a right of appeal:

" - where the complainant was unaware of his right and the authority failed to advise him of it; or

" - where the complainant was prevented by absence, illness or some other incapacity from resorting to appeal; and

" - where there is no possibility of bringing an out-of-time appeal."71

Even more generally, in October 1979, the Commission, whilst accepting that some cases will always require individual consideration on their merits, agreed the following guidelines:72

"(a) If there is a specific statutory right to appeal to a court against the Council's actions, the Commission should not exercise discretion.

"(b) If the action complained of is the failure to fulfil a duty which might be enforced by an order for judicial review (*sic*) in the High Court, the commissioner should normally not expect a complainant to risk incurring high costs to achieve a small benefit.

"(c) Failure of an authority to comply with contractual obligations that are within jurisdiction, e.g. housing repairs, mortgage matters, would normally be investigated

unless the commissioner is being asked to interpret the law, e.g. where there is a legal dispute as to the meaning of a document.

"(d) Property rights and claims of negligence are matters for the courts and therefore the commissioner would not normally investigate negligence claims or claims affecting property rights, except where:

(i) it is the way the claim was handled that is complained of, e.g. delay, members not being given full information, etc; and

(ii) the cost for the complainant in seeking a remedy in the courts is potentially high compared with the value of the right which the complainant seeks to establish or defend; and

(iii) the commissioner is not being asked to give a definitive interpretation of a disputed point of law."<sup>73</sup>

No opportunity has arisen for the court to comment on any of these guidelines, but Lord Woolf's *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1996, welcomed the fact that the local ombudsman exercises his discretion generously, and recommended that the matter should be put on a more formal basis.<sup>74</sup>

### **3. Conclusion**

The evidence indicates that although both judicial review and the local ombudsman may sometimes be regarded as providing remedies of last resort, in practice both provide a significant degree of flexibility, with the availability of alternative remedies not being necessarily determinative of individual cases. In particular, each may regard the other as an alternative remedy for the present purposes. One specific point on which the local ombudsman's approach is notably more generous is that he does not treat the possibility of defending legal proceedings as an alternative remedy, thus rendering irrelevant the distinction which the courts draw between cases such as *Wandsworth London Borough Council v. Winder* and *Avon County Council v. Buscott*.<sup>75</sup>

The remaining chapters of this thesis will be devoted to the specific question of the extent to which, in practice, the grounds for applying for judicial review may overlap with those for complaining to the local ombudsman, but meanwhile there remains one further section of the present chapter to be considered, namely a comparison between the prescriptive effects of judicial review and of local ombudsman's reports.

## **I: COMPARISON OF THE PRESCRIPTIVE EFFECTS OF JUDICIAL REVIEW AND OMBUDSMEN'S REPORTS**

### **1. Judicial Decisions**

#### **(a) Generally**

The doctrine of binding precedent as practised by the English courts may be stated thus: all courts bind all lower courts and some courts also bind themselves.<sup>76</sup> It is commonly said that, under this doctrine, the courts are bound to follow previous decisions. In reality, however, it is more usually the principles underlying the decisions which are treated as being binding, rather than the decisions themselves. In many cases, of course, the courts will not need to distinguish between the decision and the underlying principle of an earlier case, but on occasion they may feel that the distinction ought to be made. The case of *Osborne to Rowlett*,<sup>77</sup> is instructive. Lord Jessel MR not only made the distinction, but also went on to comment on the extent to which principles themselves are binding:

"Now, I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; *and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle.* In that case the prior decision ceases to be a binding authority or guide for any subsequent judge."  
(Emphasis added.)

Further recognition of the centrality of judicial principle may be found in the judgment of Robert Goff LJ in *Elliott v. C (A Minor)*.<sup>78</sup>

"In my opinion, although of course the courts of this country are bound by the doctrine of precedent, sensibly interpreted, nevertheless it would be irresponsible for judges to act as automata, rigidly applying authorities without regard to consequences. Where, therefore, it appears at first sight that authority compels a judge to reach a conclusion which he senses to be unjust or inappropriate, he is, I consider, under a positive duty to examine the relevant authorities with scrupulous care to ascertain whether he can, within the limits imposed by the doctrine of precedent (always sensibly interpreted), *legitimately interpret or qualify the principle expressed in the authorities* to achieve the result which he perceives to be just or appropriate in the particular case." (Emphasis added.)

The proposition that English Law generally proceeds in accordance with principle (and the constraints attaching to principle) rather than precedent is likely to become increasingly widely articulated as English lawyers become increasingly familiar with the techniques which the European Court of Justice employs when handling Community Law.<sup>79</sup>

#### **(b) Judicial review**

Although the matter is not entirely free from doubt,<sup>80</sup> it is probable that the High Court's jurisdiction in judicial review is not appellate (because there has been no prior adjudication on the issue of the *legality of the decision-making process*), and must, therefore be regarded as being either at first instance<sup>81</sup> or *sui generis*.<sup>82</sup> The significance of the distinction between the appellate and non appellate jurisdictions of the High Court for the



present purpose is that, strictly speaking, it is only cases falling within the former category which can be binding on the High Court in later cases. However, care must be taken not to overstate the importance of the distinction, since in practice judicial comity will normally lead a later court to follow an earlier decision, even when not bound to do so, unless it is convinced that the earlier decision was wrong.<sup>83</sup>

## **2. Local Ombudsman Reports**

Whether English lawyers regard bindingness as being a quality of the decisions of the courts, or of the principles (appropriately interpreted) underlying those decisions, there can be no doubt that the notion of bindingness is deeply ingrained in the English legal consciousness. Accordingly, lawyers approaching a body of local ombudsman reports may be tempted to ask how far – if at all – those reports will be treated as binding by the local ombudsman in later investigations. In other words, do ombudsman decisions constitute anything more than a wilderness of single instances<sup>84</sup> surrounding the key concepts of *injustice*, *maladministration* and *administrative* functions?

The answer to this question contains a number of points. First, as far as the courts are concerned – and no doubt they are influenced by their own experience of developing the common law on a case-by-case basis – there is a perception that Parliament, in leaving the term *maladministration* undefined,

"deliberately left it to the ombudsman himself to interpret the word as best he could: and to do it by building up a body of case-law on the subject." (Emphasis added.)<sup>85</sup>

If this comment is to be taken as more than the trite observation that ombudsman's reports will in fact accumulate, presumably it constitutes an acknowledgment that they will have at least some predictive value, in relation to how the ombudsman may be expected to treat individual complaints and how he may regard administrative procedures.<sup>86</sup>

The predictive value of local ombudsman reports is also implicit in the structure of the *Guide to the Local Government Ombudsman Service*. One section out of the seven which constitute the whole work, consists of *Selected Reports*, where summarized versions of a variety of cases are presented. The *Guide* states that "the intention is to give a broad indication of ombudsmen's views".<sup>87</sup> Presumably, therefore, successive editors of this work, all with experience as local ombudsmen, have taken the view that this material has at least some predictive value. Additional evidence in support of this conclusion may be derived from the practice of highlighting individual cases in the local ombudsman's Annual Reports. Furthermore, there seems to be a perception on the part of those who are subject to an ombudsman's jurisdiction that he will apply the principles which he has previously articulated:

"It is possible for a single report to have effects far beyond the geographical boundary of the authority concerned, leading to the general improvement in administrative standards in local government."<sup>88</sup>

### 3. Conclusion

The evidence supports the argument that the processes of judicial review and ombudsmanship both produce statements of principle which have some predictive value. More particularly, decision-makers may use them for guidance as to the requirements of legality and good administration respectively, while, as the other side of the same coin, those who feel aggrieved in specific instances are able to assess their chances of success if they decide to pursue a complaint through either route.

However, closer examination reveals some distinctions, arising principally from the way in which local ombudsman's reports are written; their non-bindingness, even on the local authorities concerned; and their relatively limited circulation (when compared with law reports), which makes it significantly less likely in practice that potential challengers, and their advisers, will be aware of them.

### J: CONCLUSION

Judicial review and ombudsmanship possess a number of similarities. The requirement of *locus standi*, and the qualifying condition of being a "person aggrieved", each operate to exclude mere busybodies from interfering. The initiation of each process is subject to a relatively short time-limit, with judicial review being particularly restrictive, but in each case there is the possibility of extension if, on balance, the interests of justice or fairness require it. Similarly, both processes provide what are essentially remedies of last resort, though once again there is scope for the exercise of discretion in order to allow matters to proceed

even if an alternative remedy is available. In this context, the court tends to be stricter than the local ombudsman.<sup>89</sup>

The final similarity worthy of comment is the predictive value of judicial decisions and ombudsman's reports. Although there is no express notion of self-bindingness on the part of the local ombudsman, there is no doubt that the formulation of principles of good administration is one product of the ombudsman process. To this extent, therefore, there is a parallel with the judicial process, where the true basis of the doctrine of precedent involves fidelity to principles rather than decisions.

Turning to the differences between judicial review and ombudsmanship, there is a clear distinction in the extent to which the parties will be publicly identified. Anonymity is the exception in judicial review, but (apart from the local authority itself) the rule in ombudsmanship.

Similarly, at a conceptual level, the processes are also different in terms of the enforceability of their remedies. In some instances, however, this difference may be more apparent than real, since the judicial remedy of declaration is unenforceable and it is not uncommon to find the court making no order at all, and merely leaving the judgment to stand on its own as a statement of the relevant legal principle.<sup>90</sup>

A further difference arises with regard to the availability of the processes in contractual contexts. On the basis that such matters give rise to rights in private law, they would be excluded from the scope of judicial review. To some extent the same is true of the ombudsman remedy, as Sch.V to the 1974 Act shows. However, in practice it is not uncommon for the local ombudsman to deal with complaints from tenants against local

authorities *qua* landlords, where there is clearly also the possibility of pursuing private law rights.

Having sketched the origins and outlined the scope of both judicial review and the local ombudsman, and having undertaken a comparative analysis of the procedural aspects of each, it is now appropriate to proceed to a comparison of the grounds on which each process is invoked, with the particular aim of considering the extent (if any) to which both share common principles of good decision-making.

<sup>1</sup> But if only a declaration is issued, or if the court relies simply on the judgment itself (see, p.21, n.9, above) there will be no enforcement possibility associated with judicial review.

<sup>2</sup> Proof "on the balance of probabilities" means:

"If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."

(Denning LJ in *Miller v. Minister of Pensions* [1947] 2 All ER 372.)

<sup>3</sup> [1984] *The Times*, March 29.

<sup>4</sup> [1991] 4 All ER 310.

<sup>5</sup> [1986] 2 All ER 941.

<sup>6</sup> See p.139, below, for the law relating to the giving of reasons.

<sup>7</sup> See n.2, above.

<sup>8</sup> Supreme Court Act 1981, s.16(1), and Administration of Justice Act 1960, s.1(2), respectively.

<sup>9</sup> [1979] 2 All ER 881.

<sup>10</sup> Although sometimes a conflict of evidence need not be resolved. For example, in a complaint against *Wirral Metropolitan Borough Council*, which is discussed further at p.142, below, a school claimed to have sent letters to a child's mother, which she denied having received. The local ombudsman had no evidence on which to reject the mother's claim that she did not receive any of the letters, but refused to say that the

fact that she may not have done so was the result of any maladministration by the local education authority.

<sup>11</sup> I.e. assuming, as will almost invariably be the case, that a complaint to the local ombudsman does not arise out of criminal conduct.

<sup>12</sup> Subsection (5) provides that neither the Parliamentary Commissioner, nor the Health Service Commissioners, nor their officers shall be liable to compulsion under subs.(3).

<sup>13</sup> The local ombudsman may also apply to the High Court for a writ of subpoena under RSC O.38, r.19: *Re a Subpoena Issued by the Commissioner for Local Administration* (1996) 8 Admin LR 577.

<sup>14</sup> The doctrine known as *Crown Privilege* until the decision of the House of Lords in *R. v. Lewes Justices ex parte Home Secretary* [1973] AC 388, is now generally known as *Public Interest Immunity*.

<sup>15</sup> The local ombudsman's lack of enforcement powers generally is discussed at pp.41-42, above.

<sup>16</sup> 88/C/0967 against Manchester City Council: see, McLeod, *Local Government Ombudsman: A Casebook*, 1993, p.4.

<sup>17</sup> However, the High Court does have inherent jurisdiction to order otherwise where the interests of justice so require: *R. v. Westminster City Council ex parte Castelli and Another* (1995) 7 Admin LR 840.

<sup>18</sup> The Convention has not been incorporated into English law, but is relevant when interpreting English law - see, e.g., *Trawnik v. Lennox* [1985] 1 WLR 532.

<sup>19</sup> The text of the Code is reproduced as Appendix II to this thesis, and its use by the local ombudsman is discussed further in chapter 5.

<sup>20</sup> If the member who referred the complaint to the local ombudsman is no longer a member of the local authority, the section requires that the copy should be sent to the chairman or mayor of the local authority.

<sup>21</sup> See, p.42, above, for Further Reports

<sup>22</sup> *Certiorari* quashes decisions which have already been made; *prohibition* prohibits future illegality; *mandamus* compels the performance of public duties; *injunctions* are orders that something should either be done or not done, as the case may be; and *declarations* are merely declaratory of the law.

<sup>23</sup> Against local authorities at any rate: the topic of enforceability against the Crown is outwith the scope of this thesis.

<sup>24</sup> However it is not uncommon to find the court making no order at all, and merely leaving the judgment to stand on its own as a statement of the relevant legal principle. See p.21, n.9, above.

<sup>25</sup> (1995) 7 Admin LR 705.

<sup>26</sup> But not Northern Ireland where non-compliance with a report constitutes a cause of action in the County Court - see the Commissioner for Complaints Act (Northern Ireland) 1969.

<sup>27</sup> Note, however, that Lord Woolf's *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1996, recommended (at p.222) the introduction of enforceability. The *Report of the Financial Management and*



*Policy Review of the Commission for Local Administration*, August 1996, merely recommended that the matter should be given further consideration, noting particularly the local ombudsman's concern that enforceability would result in the ombudsman process being seen as adversarial rather than investigative, which would be "detrimental to complainants." (See, para.401 of the Report.)

<sup>28</sup> Section 30 of the 1974 Act: see p.38, above.

<sup>29</sup> Inserted by s.28 of the 1989 Act.

<sup>30</sup> Section 31A(4), inserted by s.28 of the 1989 Act.

<sup>31</sup> Section 31A(1), inserted by s.28 of the 1989 Act.

<sup>32</sup> Section 31, subss.(2G) & (2H) of the 1974 Act, inserted by s.28 of the 1989 Act.

<sup>33</sup> See Appendix II to this thesis.

<sup>34</sup> [1981] 2 All ER 93.

<sup>35</sup> *R. v. Secretary of State for Social Services ex parte Child Poverty Action Group and Others* [1989] 1 All ER 1047.

<sup>36</sup> [1976] 1 WLR 550.

<sup>37</sup> [1970] 1 WLR 1424.

<sup>38</sup> There is no reason to doubt that the same principle will apply to council tax payers.

<sup>39</sup> See, e.g., *R. v. Poole Borough Council ex parte Beebee and Others* [1991] COD 264; *R. v. H.M. Inspectorate of Pollution ex parte Greenpeace (No.2)* [1994] COD 56; *R. v. Secretary of State for Foreign Affairs ex parte World Development Movement Ltd* [1994] 1 WLR 386; and *R. v. Secretary of State for the Environment ex parte Friends of the Earth Ltd* (1995) 7 Admin LR 793.

<sup>40</sup> *Judicial Review of Administrative Action*, 5th ed., 1995, p.121.

<sup>41</sup> *R. v. Newham London Borough Council ex parte Haggerty* (1987) 85 LGR 48 is an example of such an application. (The court held that a local authority can make appointment to committees dependent on members declaring interests which would not otherwise need to be declared.)

<sup>42</sup> In practice, it is not uncommon for solicitors to act on behalf of complainants. In these cases the normal principles of agency (*qui facit per alium facit per se*) mean that the complaint remains that of the complainant.

<sup>43</sup> 2.2-01.

<sup>44</sup> See, Samuels, (1992) 156 LG Rev 721.

<sup>45</sup> (1990) 154 JP 145.

<sup>46</sup> The relevant scheme of licensing is contained in the Local Government (Miscellaneous Provisions) Act 1976.

<sup>47</sup> *Quillotex & Co Ltd v. Minister of Housing & Local Government* [1965] 2 All ER 913.

<sup>48</sup> For the dominance of the purposive approach to statutory interpretation, see, e.g., Lord Diplock in *Carter v. Bradbeer* [1975] 3 All ER 158:

"If one looks back to the actual decisions of this House ... over the last thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions."

49 Section 27(1) of the 1974 Act (quoted fully at p.46, above).

50 [1990] 2 All ER 434.

51 [1979] 2 All ER 881.

52 The Hague Rules deal with the carriage of goods by sea.

53 2.1-07.

54 [1972] Imm AR 253.

55 (1991) 155 JP 645.

56 On the facts, the Court of Appeal held that the statutory appeal procedure was geared exactly to deciding the issue in question, which was whether or not a plastic toy contained in a chocolate egg constituted a danger to children.

57 *R. v. Humberside County Council ex parte Bogdal* (1993) 5 Admin LR 405, where the substantive issue was the suitability of the applicant to be registered under the Registered Homes Act 1984.

58 (1897) 62 JP 275.

59 [1959] 3 All ER 1.

60 [1974] 2 All ER 643.

61 [1996] COD 398.

62 Taken in its entirety, this comment is odd since proportionality as such does not constitute a ground for judicial review (see, e.g., Lord Lowry's speech in *R. v. Secretary of State for the Home Department ex parte Brind* [1991] 1 All ER 720), but its gist is consistent with Lord Diplock's statement in *Energy Conversion Devices Incorporated's Application* [1982] FSR 544:

"Your Lordships should, however, in my view take this opportunity of stating once again the important constitutional principle that questions of construction of all legislation, primary or secondary, are questions of law to be determined authoritatively by courts of law, that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however specialized and prestigious they may be, are subject to correction by judicial review ... "

<sup>63</sup> For criticism, see McLeod, *Challenging the Validity of Byelaws by Way of Defence to Prosecution* [1994] Crim LR 35.

<sup>64</sup> [1984] 3 All ER 976.

<sup>65</sup> [1988] 1 All ER 841.

<sup>66</sup> The *Wednesbury* principle is considered in ch.3.

<sup>67</sup> This may appear to create a logical difficulty when read in conjunction with *R. v. Lambeth London Brough Council ex parte Crookes* (see p.56, above) because an applicant/complainant could be shunted back and forth between the court and the local ombudsman, with no possibility of obtaining a remedy from either. In reality, however, the local ombudsman would no doubt regard it as "not reasonable" (see the text to the next following note) to expect a complainant to pursue an application for judicial review which the court has rejected on the basis that complaint to the local ombudsman constitutes an alternative remedy.

<sup>68</sup> It is this provision which provides an escape from the logical impasse envisaged in the previous note.

<sup>69</sup> 2.1-03.

<sup>70</sup> See p.57, above, for an explanation of these cases.

<sup>71</sup> 2.1-03.

<sup>72</sup> 2.1-04.

<sup>73</sup> The local ombudsman's view that he should not attempt to usurp the function of the court is - perhaps not surprisingly - shared by the court itself. See, *R. v. Commissioner for Local Administration ex parte Croydon London Borough Council*, (p.18, above).

<sup>74</sup> See, p.222 of the Woolf Report.

<sup>75</sup> See, p.56, above.

<sup>76</sup> See, e.g., McLeod, *Legal Method*, 2nd edn, 1996, Part II.

<sup>77</sup> (1880) 13 Ch D 774.

<sup>78</sup> [1983] 2 All ER 1005.

<sup>79</sup> See, e.g., McLeod, *Legal Method*, 2nd edn, 1996, chapter 16.

<sup>80</sup> See, e.g., McLeod, *Legal Method*, 2nd edn, 1996, at pp.192-194.

<sup>81</sup> *R. v. Greater Manchester Coroner ex parte Tal* [1984] 3 All ER 240.

<sup>82</sup> *R. v. Leeds County Court ex parte Morris and Another* [1990] 1 All ER 550.

<sup>83</sup> *Poole Borough Council v. B & Q (Retail) Ltd* [1983] *The Times*, January 29.

Although the fact of judicial comity probably originated in professional loyalty between judges, it also serves the purposes of increasing predictability (thus saving costs on the part of prospective litigants and reducing the court's workload), as well as underlining the importance which the court accords to legal principle, even when it is free from the fetters of binding precedent.

<sup>84</sup> The phrase is Tennyson's: see, *Aylmer's Field*.

<sup>85</sup> Lord Denning MR, in the *Bradford* case, when referring to the Crossman catalogue. However, the courts have not attempted any further elucidation of the concept.

<sup>86</sup> However, as Gregory and Hutchesson commented, in the early days of the Parliamentary Commissioner for Administration:

"Although a rudimentary 'jurisprudence' of sorts is beginning to emerge from the work of the Commissioner, his findings as regards jurisdiction, maladministration, injustice and remedy can scarcely be said to constitute anything like a systematic body of ascertainable public law." (*The Parliamentary Ombudsman*, 1975, pp. 664-5.)

<sup>87</sup> 6-01.

<sup>88</sup> Logie and Watchman, *The Local Ombudsman*, 1990, p.252. (This book is a study of the Scottish Local Ombudsman, but the principle is plainly of general application.)

<sup>89</sup> The extent to which the local ombudsman applies the alternative remedy principle where the alternative remedy is judicial review, is of course, a major aspect of this thesis - see, chapters 3, 4 and 5, below.

<sup>90</sup> See, p.21, n.9, above.

## **CHAPTER 3**

### **RELEVANCE AND REASONABLENESS IN DECISION-MAKING**

#### **A: INTRODUCTION**

This chapter begins with a statement of the most basic grounds for applying for judicial review. It proceeds to analyse some recurrent problems which give rise to applications for judicial review and shows that very similar issues also arise in the context of local ombudsman's investigations. The evidence suggests that the local ombudsman liberally exercises his discretion to investigate complaints even where there is an alternative remedy by way of judicial review.<sup>1</sup>

#### **B: THE *WEDNESBURY* PRINCIPLE AND ITS *GCHQ* RE-FORMULATION**

Although the grounds for judicial intervention are always subject to further development by the courts, one of the leading statements of the basic principles comes from the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.<sup>2</sup> The facts of the case raised the question of whether a local authority was entitled to have regard to the moral welfare of children when exercising its statutory discretion to license Sunday entertainments. Approaching the heart of the matter, the Master of the Rolls began by explaining the concept which is now commonly referred to as "*Wednesbury* relevance":

"When discretion of this kind is granted, the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one, and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. *The exercise of such a discretion must be a real exercise of the discretion.* If, in the statute conferring the discretion, there is found to be, expressly or by implication, matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters." (Emphasis added.)

He went on to acknowledge that although decision-makers who breach the principle of relevance cannot be said to be acting *reasonably*, there was also another sense in which *reasonableness* could be understood, and, not surprisingly, this has come to be known as "*Wednesbury* reasonableness":

"... the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It



has frequently been used, and is frequently used, as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, *there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*" (Emphasis added.)<sup>3</sup>

The two concepts of *Wednesbury* relevance and *Wednesbury* reasonableness, when taken in conjunction with Lord Greene's insistence that "the exercise of such a discretion must be a real exercise of the discretion" can be used as the basis of practically all applications for judicial review, although it is conventional to give discrete treatment to certain sub-topics, such as fettering discretion by contract, estoppel and legitimate expectation, and the requirements of natural justice.<sup>4</sup> However, for no apparently good reason, in the *GCHQ* case,<sup>5</sup> Lord Diplock introduced a new scheme of classification:

"One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call *illegality*, the second *irrationality*, and the third *procedural impropriety* ... By *illegality* ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it ... By

*irrationality* I mean what can now be succinctly referred to as *Wednesbury unreasonableness* ... I have described the third head as *procedural impropriety* rather than as failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even though such failure does not involve any denial of natural justice."<sup>6</sup>

It seems there is nothing to be gained, and something to be lost, by re-formulating the grounds for judicial review in this way. In the first place, it is odd to classify one head of judicial review as "illegality", when it is fundamental to the whole jurisdiction in judicial review, on whatever ground it is invoked, that there must be illegality before the court can intervene. Secondly, nothing is gained by simply re-labelling *Wednesbury* unreasonableness as *irrationality*. Thirdly, the newly coined principle of *procedural impropriety* merely provides a single label for those situations in which procedural requirements must be complied with, whether the specific requirements in question are created by common law on the one hand or by statute or delegated legislation on the other.

However, leaving aside the question of its validity, there is no doubt that the consequence of the re-classification has been the creation of a dual standard of

terminology, with only some judges adopting the new scheme whole-heartedly.<sup>7</sup> This must be borne in mind when reading the case-law.

## **C: THE PRINCIPLE OF RELEVANCE IN OPERATION**

### **1. Generally**

#### **(a) Judicial Review**

First, as Lord Greene MR acknowledged in the *Wednesbury* case itself, the statute which confers a discretion may expressly provide that some factors are either relevant or irrelevant. Many statutes specify matters which are relevant to the exercise of specific discretions. For example, s.70(2) of the Town and Country Planning Act 1990 provides that when determining an application for planning permission, a local planning authority

"shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Less common are statutes excluding specified matters from consideration, but a notable example from the realm of local government law may be found in ss.17 *et seq.* of the Local Government Act 1988, which prohibit local authorities<sup>8</sup> from taking non-commercial matters into account when making decisions relating to contracts for the

supply of goods, materials or services, or for the execution of works. The Act defines "non-commercial matters" at some length, to include matters such as the rates of pay which a contractor pays his workforce, and the sexual and ethnic composition of that workforce; any involvement of a contractor in irrelevant fields of Government policy (for example, defence contracts); the involvement of a contractor in industrial disputes; the country of origin of supplies to, or the location in any country of, business interests of a contractor; and the political, industrial or sectarian affiliations or interests of a contractor, or his directors, partners or employees (the key terms in this provision being defined in such a way that, for example, freemasonry is plainly included). Section 18 of the Act specifically provides that, broadly speaking, the prohibition on having regard to non-commercial considerations shall override the general statutory duty of local authorities to make appropriate arrangements for securing that their functions are carried out with due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good race relations.<sup>9</sup>

Secondly, and more usefully in general terms, there is the *Padfield* principle,<sup>10</sup> which states that the purpose of the statute which confers the discretion will always be relevant. One of the neatest illustrations of this principle in practice is found in the case of *Pilling v. Abergele Urban District Council*,<sup>11</sup> where the local authority had power, under the Public Health Act 1936, to license sites for moveable dwellings. It refused one application, on the ground that the site would be harmful to amenity. The court held that this was unlawful, on the basis that only public health matters were relevant to the exercise

of powers under the Public Health Act. Amenity matters were within the purview of planning law, but were irrelevant in the present context.

### **(b) The Local Ombudsman**

The local ombudsman's reports show that he shares the courts' view that it is important to have regard to the right considerations, and, more particularly that he regards failure to do so as being capable of constituting maladministration. For example, a complaint against *Southwark London Borough Council*<sup>12</sup> arose from a situation in which a local authority tenant had withdrawn an application to exercise his "right to buy", but believed that he had subsequently withdrawn his withdrawal, thus re-instating his original application. The local authority, on the other hand, treated the initial withdrawal as continuing to be effective. By the time this confusion had been resolved and the tenant had made a second application, the price he would have had to pay had increased by £6,500. The local ombudsman recommended that the applicant should be allowed to proceed at the original price. The local authority rejected this recommendation for a variety of reasons, one of which was that there were known to be several similar cases in which tenants had changed their minds about withdrawing their applications, and the establishment of a precedent in this case would, therefore, have wider financial implications. Indicating that this was an irrelevant consideration, the local ombudsman, in a Further Report,<sup>13</sup> quoted his own *Annual Report for 1987-88*:

"To refuse to remedy one specific injustice on the grounds that it might encourage others who have also been badly treated to complain, and to be entitled to a remedy, is nothing less than a determination to perpetuate injustice".

In addition to the local ombudsman's explicit point, this case can also be read as an example of maladministration flowing from the local authority's excessive willingness to rely on policy, at the expense of evaluating the circumstances of the case on an individual basis. It is appropriate at this stage, therefore, to consider the extent to which policies may be relevant considerations.

### **(c) Conclusion**

It is clear, therefore, that the principle of relevance applies in both judicial review and ombudsmanship, thus providing further support for the argument of this thesis that, in practice, there is a substantial overlap between the activities of the court and the local ombudsman.

## **2. The Relevance of Policy**

### **(a) Judicial Review**

The fact that public sector decision-makers formulate and apply their own policies may be thought to be too obvious to require either explanation or justification, but in the present context it does raise a very specific problem: at what stage, if at all, does decision-making

in the light of a policy amount to a breach of Lord Greene's requirement<sup>14</sup> that "the exercise of ... a discretion must be a *real* exercise of the discretion"? (Emphasis added.)

The classic case is *R. v. Port of London Authority ex parte Kynoch*,<sup>15</sup> where Bankes LJ said:

"There are on the one hand cases where a tribunal [*sc.* a decision-maker] in the honest exercise of its discretion has adopted a policy, and, without refusing to hear the applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case ... If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two cases."<sup>16</sup>

Quite apart from applying their own policies, public sector decision makers may also lawfully take into account policies formulated by other people. Typically, these policies will emanate from Secretaries of State and will be contained in departmental circulars. Such policies are clearly relevant considerations, as Purchas LJ made clear in the planning law case of *Carpets of Worth Ltd v. Wyre Forest District Council*.<sup>17</sup>

"Although the local authority is not bound by ... policy circulars, it should observe them and depart from them only if there are clear reasons, which should be stated, for so doing."

### **(b) The Local Ombudsman**

The local ombudsman's reports indicate that he shares not only the court's acceptance that local authorities are entitled to have policies, but also the corresponding insistence that the adoption of a policy does not justify a failure to exercise real discretion in individual cases. In a report on an investigation into a complaint against *Camden London Borough Council*,<sup>18</sup> the local ombudsman said that a local authority was entitled to have a policy of allowing travellers to camp on vacant land which it owned, but went on to say that this policy did not justify either a failure to follow normal planning procedures, or the toleration of nuisances caused by the travellers.

Similarly, in a report on an investigation into a complaint against *Wandsworth London Borough Council*,<sup>19</sup> the local ombudsman accepted that the local authority was entitled to adopt a policy of using bailiffs at an early stage when pursuing rent arrears, but also emphasized that there was a duty to exercise particular care when applying that policy to vulnerable people, such as the mentally ill.

The local ombudsman's reports also show that he shares the courts' view that central government policy is a material consideration in the decision making process. Thus, following an investigation into a complaint against *South Norfolk District Council*,<sup>20</sup> the local ombudsman found maladministration had occurred where the local authority



granted planning permission for certain residential premises to be used as a nursing home, subject to a condition that the benefit of the permission should be restricted to the applicants.<sup>21</sup> Although there is no legal objection in principle to planning permission being granted on the basis that its benefit shall be personal to the applicant, the fact that the land use planning process is concerned with the impact of land uses on other people means that in practice such permissions will be strictly exceptional. In this instance, the local ombudsman found that the local authority had failed to have proper regard to the guidance contained in the Secretary of State for the Environment's Circular 1/85, which required the use of personal planning permissions to be justified on "strong compassionate or other personal grounds".

The importance which the local ombudsman attaches to central government advice can be gauged from two reports into investigations on complaints against *Glanford Borough Council*,<sup>22</sup> and *Avon County Council*.<sup>23</sup> In the *Glanford* report, which concerned the local authority's failure to grant a football club relief from rates in respect of its ground, the local ombudsman emphasized that where officers make a recommendation to members, and those recommendations are at variance with central government advice, the officers should ensure that the members are fully apprised of the situation. In the *Avon* report, which involved the administration of appeals against decisions allocating children to schools, the local ombudsman said that it was maladministration for a local authority to fail to review its own policy in the light of guidance contained in a Department of Education Circular.

As the report on an investigation into a complaint against *Camden London Borough Council*<sup>24</sup> shows, questions of prioritising the allocation of scarce resources may also impact on questions of policy. However, it is better for the purposes of clarity of exposition to treat the topic of resource constraints discretely.

### **(c) Conclusion**

Both judicial review and ombudsmanship acknowledge the status of policies as relevant considerations, provided they are operated with sufficient flexibility to prevent them from becoming determinative of all cases to which they apply. Once again, therefore, the evidence supports the argument of this thesis that there is, in practice, a very substantial overlap between the activities of the court and the local ombudsman.

## **3. The Relevance of Resource Constraints**

### **(a) Judicial Review**

From the courts' point of view, the problems caused by resource constraints raise fundamental constitutional issues of accountability, based on the doctrine of the separation of powers. More particularly, and bearing in mind the democratic accountability of local authorities, it is not surprising that the court will be reluctant to intervene in policy decisions.<sup>25</sup> One of the leading examples is *Anns v. London Borough of Merton*,<sup>26</sup> concerning the way in which a local authority should have concentrated the activities of its

building inspectors when they were unable to subject all building work to full inspection.

Lord Wilberforce said not only that it was for

"public authorities ... to strike a balance between the claims of efficiency and thrift"

but also that

"whether they get the balance right can only be decided through the ballot box, not in the courts."<sup>27</sup>

However, it is easy to overstate the proposition that resource constraints, coupled with the perceived effectiveness of the democratic process as an agency of control, may lead the courts to treat resource issues as being non-justiciable. The courts can be expected always to be conscious of their constitutional role in upholding the rule of law. The key distinction in this context seems to be between those cases where resource constraints make it genuinely impossible to comply with the law, and those where they make it merely difficult to do so.

First, the courts can be expected to be very sceptical of any argument which suggests that apparent illegality should be accepted on the grounds that it would have been impossible for the decision-maker to have adopted any other course of action. However, it is not completely unknown for such an argument to succeed, especially where the resource in question is the capacity of an individual to perform all those functions which the

law allocates to him. In *Carltona Ltd. v. Commissioners of Works*<sup>28</sup> the company owned a factory which was requisitioned by the Commissioners of Works. The order requisitioning the factory was challenged on a number of grounds, but Lord Greene MR accepted that the Assistant Secretary who was in charge of the matter was the proper decision-maker:

"In the administration of government ... the functions which are given to Ministers ... are ... so multifarious that no Minister could ever personally attend to them ... [so] ... the powers given to Ministers are normally exercised ... by responsible officials ... *Public business could not be carried on if that were not the case.*"

(Emphasis added.)

Even this argument may not, however, always find favour with the court. In *R. v. Gateshead Justices ex parte Tesco Stores Ltd.*<sup>29</sup> s.1 of the Magistrates' Courts Act 1952 provided that when an information was laid, either a justice of the peace or a justices' clerk could issue a summons. At the time of this case there was a widespread practice of delegating to members of justices' clerks' staff the decision as to whether or not to issue summonses. The essence of this decision, which in reality is almost entirely routine, involves deciding whether or not the facts alleged in the information disclose an offence. Donaldson LJ, rejecting the argument that the workload was such that delegation was necessary in purely practical terms, and therefore must be taken to have been impliedly authorized, said:

"The short answer to this is that if the practice is unlawful, expedience will not make it lawful. *Fiat justitia, ruat coelum.*"

On the other hand, a decision maker is more likely to be successful if he seeks to persuade the court that he is doing his best under adverse conditions, and that accordingly his conduct should not be stigmatised as unlawful. Two cases involving allegations that the Metropolitan Police Commissioner had abdicated his duty to enforce the law are instructive.<sup>30</sup>

*R. v. Metropolitan Police Commissioner ex parte Blackburn*<sup>31</sup> arose from the Commissioner's policy of not prosecuting in gaming cases unless there was evidence either of cheating, or that a particular club had become a haunt of criminals. The Commissioner based his policy on the argument that he could not justify allocating scarce resources to the necessary surveillance and consequent prosecution processes when the interpretation of gaming law was so uncertain that there was insufficient likelihood that convictions would result. The Court of Appeal made it plain that, in principle, the court could compel the Commissioner to perform his duty of enforcing the law, although in this case no such order was appropriate because the Commissioner had revised his policy, saying that he would start enforcing the law on the basis of a definitive interpretation given by the House of Lords<sup>32</sup> some six weeks before the Court of Appeal hearing in the present case.

In *R. v. Metropolitan Police Commissioner ex parte Blackburn (No. 3)*,<sup>33</sup> the essence of the complaint was that the Commissioner was failing to enforce the law against "hard" pornography in Soho, preferring to direct his force's energy against "soft"

pornography elsewhere. The Court of Appeal re-stated the basic proposition that, in an appropriate case, the court could order the Commissioner to perform his duty of enforcing the law. However, once again, on the facts, the court refrained from making such an order, on the basis that the Commissioner was doing his best with the limited resources at his disposal, and had recently increased the number of officers allocated to obscene publications duties.

It seems that the position may be different where the duty is statutory. In *R. v. Gloucestershire County Council ex parte Barry*<sup>34</sup> the Court of Appeal held, by a majority that lack of resources did not excuse a local authority's failure to perform its duty of meeting needs in accordance with s.2 of the Chronically Sick and Disabled Persons Act 1970, although if needs could be met in more than one way it would be legitimate to have regard to resource constraints when deciding which one to adopt.<sup>35</sup>

#### **(b) The Local Ombudsman**

The local ombudsman's attitude to the practicalities of constrained resources parallels the attitude of the courts. Briefly, his attitude is that matters which can properly be attributed to lack of resources cannot be characterised as maladministration, but he will be slow to conclude that any particular case falls within this category. This point is illustrated in the following series of reports.

In a report on an investigation into a complaint against *Wakefield Metropolitan District Council*<sup>36</sup> the local ombudsman accepted that the legal duty of a local authority to

give first consideration to the need to safeguard and promote the welfare of children in its care cannot be seen in isolation from the fact that the local authority has finite resources.<sup>37</sup>

The report on an investigation into a complaint against *Hackney London Borough Council*.<sup>38</sup> provides an example of a situation in which the true cause of injustice to the complainant was lack of resources, rather than maladministration. The local authority had failed to provide security measures at a community hall on one of the council's housing estates. The hall had been subject to repeated break ins and at one stage the glass in the part of the building which was the favoured point of entry had been replaced 110 times in two years. One of the local authority's building surveyors said that he would undertake a survey and draw up a specification for the works, and that he hoped the necessary works would go out to tender within a few months. In the event, the surveyor did undertake the survey but pressure of work prevented him from preparing the specification, and in due course the local authority's overall financial position led to the project being abandoned. The local ombudsman rejected the complaint on the basis that

"it is therefore because of scarce financial resources that the works have not been done, rather than any administrative fault by the council".

Similarly, in a report on an investigation into a complaint against *Cyngor Dosbarth Dwyfor*<sup>39</sup> the local ombudsman declined to find maladministration where a failure to comply with the statutory obligation<sup>40</sup> to process applications for housing renovation grants within six months was due entirely to a lack of money with which to pay any grant

which may have been due. It is important to note that in this case the lack of resources was irremediable, and the situation could not even have been covered by borrowing, because the local authority had exhausted its Supplementary Credit Approval.<sup>41</sup> By way of contrast, in a report on an investigation into a complaint against *Camden London Borough Council*<sup>42</sup> the local ombudsman concluded that where the Chronically Sick and Disabled Persons Act 1970 imposed a duty on a local authority to adapt a dwelling for the needs of a disabled person, the local authority could not excuse itself on the basis of shortage of resources.<sup>43</sup> The key point was that the local authority had adopted a policy of leaving such jobs to compete for attention within the local repairs budgets, rather than prioritising such work across the whole of its area.

The reports show that the local ombudsman does not regard mere pressure of work and shortage of staff as justifying inactivity. In a report on an investigation into two related complaints against *Rotherham Metropolitan Borough Council*,<sup>44</sup> the local ombudsman found that failure adequately to monitor noise emanating from premises used for clay-pigeon shooting amounted to maladministration, even though the failure arose from "chronic" staff shortages and the fact that the shooting took place on Sundays. Noting that the control of pollution legislation imposed on the council a duty to secure the abatement of such nuisances, the local ombudsman went on to observe that the local authority had failed to consider employing outside consultants to undertake the necessary monitoring, and concluded that this failure was maladministration.

Similarly, in a report on an investigation into a complaint against *Derbyshire County Council*,<sup>45</sup> the local ombudsman concluded that staffing difficulties did not absolve



a local authority from performing its statutory obligations to assert and protect the public's rights to use footpaths in its area.<sup>46</sup>

Finally, the report on an investigation into two related complaints against *Hackney London Borough Council*<sup>47</sup> provides a useful overview of the local ombudsman's attitude to cases where the local authority seeks to rely upon the inadequacy of its resources to justify something which would otherwise be maladministration. The facts of the complaints involved failures to deal properly with matters relating to the maintenance, repair and improvement of communal areas on one of the local authority's housing estates. The local ombudsman recognised that the local authority was operating under "severe financial constraints", but commented that this made it "even more important that procedures are in place to ensure that the money available is spent equitably." Failure to do so was said to be maladministration.

### **(c) Conclusion**

Both the courts and the local ombudsman acknowledge the reality of resource constraints and may regard them as being sufficient to excuse matters which would otherwise be either *ultra vires* or maladministration, although both will be slow to allow a decision-maker to escape an adverse finding on this basis, and in cases involving statutory duties the courts may refuse to do so altogether.<sup>48</sup> Once again, therefore, the evidence supports the argument of this thesis that, in practice, the courts and the local ombudsman proceed on very similar bases.

## **D: THE PRINCIPLE OF REASONABLENESS IN OPERATION**

### **1. Judicial Review**

Lord Greene MR's version of *unreasonableness* as

"something so absurd that no sensible person could ever dream that it lay within the powers of the authority"<sup>49</sup>

was re-worked by Lord Diplock in *GCHQ*<sup>50</sup> as something which

"is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it."

Although *Wednesbury* unreasonableness is extremely difficult to establish as a ground of challenge, it does occasionally succeed. For example, *Backhouse v. Lambeth London Borough Council*<sup>51</sup> arose from the requirement of the Housing Finance Act 1972 that local authorities should either introduce a scheme of fair rents, or increase rents across the board by 50p per week. The local authority, wishing to adopt neither alternative in substance, identified one of its houses which was not only vacant, but was also in such poor condition that it was unlikely ever to be let. The local authority then increased the rent of that house from £7 per week to £18,000 per week. When this increase was averaged out across the whole of the local authority's housing stock, it could be argued that rents had

been increased by 50p per week. The High Court held this to be totally unreasonable, since it was clearly designed simply to circumvent the purpose of the statute, rather than being a genuine exercise of the discretion which the statute conferred.<sup>52</sup>

## **2. The Local Ombudsman**

The two items in the Crossman catalogue<sup>53</sup> which most closely correspond to *Wednesbury* unreasonableness and *GCHQ* irrationality,<sup>54</sup> are *perversity* and *arbitrariness*, since it would be difficult to argue that any reasonable decision-maker could act in a way which was either perverse or arbitrary. Perhaps not surprisingly, there are few situations in which findings of maladministration are expressly based on these grounds, but the report of an investigation into a complaint against *Llanelli Borough Council*, which will shortly be discussed, does provide one example of such a finding, while the instances discussed subsequently indicate that a finding of maladministration may be based on something akin to perversity or arbitrariness without either of these terms actually being used.

In the *Llanelli Borough Council* report<sup>55</sup> the local ombudsman found that although the local authority had stated publicly that it was guided by a points scheme when allocating tenancies, in practice, allocations depended largely on the patronage of individual councillors. He concluded that this was "arbitrary, inconsistent and unfair" and was therefore maladministration.

Turning to the more common situation where the vitiating factor is akin to either perversity or arbitrariness, without there being any express finding in either of those terms,

the reports of investigation into complaints against *Greenwich London Borough Council*<sup>56</sup> and *Wakefield Metropolitan District Council*,<sup>57</sup> are instructive.

In *Greenwich*, the local ombudsman found maladministration where the local authority had a policy that applicants for accommodation who were homeless and who had not previously been tenants of the local authority, would normally be offered only flats and maisonettes, rather than houses. The chair of the Housing Committee told the local ombudsman that if houses were not excluded one consequence would be that

"all houses would [be] offered to people the council had accepted as homeless.

About 20 to 40 houses become vacant each month and the council would have a major problem defining a policy to determine *which* homeless families would be offered houses. (Over 40 offers are made each week to families who have been accepted as homeless). In seven years as chair of the committee no member or officer or voluntary organization has been able to identify criteria for allocation of houses to the homeless which are not only *fair* but *perceived to be fair*." (Original emphasis.)

The constitution of the complainant's household, which included her young children and her disabled father, meant that she needed four-bedroomed accommodation, and if it were a flat or maisonette it would need to be either on the ground floor or in a low-rise block with a lift. Section 22 of the Housing Act 1985 required local authorities to give "reasonable priority" to the homeless, and s.71 of the Act required that account should

be taken of the Department of the Environment's *Code of Guidance*. The text of the Code changed while the complainant was on the waiting list, but even the later - and from her point of view less favourable - version required local authorities to have regard to the special needs of individual applicants.

Although the ratio of flats to houses in the local authority's housing stock was over 2:1, the ratio of suitable flats to suitable houses was less than 1:3<sup>58</sup>. During the time the complainant was on the waiting list, 30 suitable houses were let in her area of choice, compared with only one suitable flat. She was, therefore, significantly disadvantaged by the policy.

The local ombudsman noted that the chair of the Housing Committee felt that fairness in relation to the homeless was unattainable, but found this view to be "surprising to say the least." He went on to conclude that the local authority's policy did not comply with the requirements of the Housing Act and was unfair because it

"unreasonably restricts the options available to most homeless people as compared with existing tenants in housing need. I consider this aspect of the council's housing policy is unfair and amounts to maladministration."

In the report on an investigation into a complaint against *Wakefield Metropolitan District Council*,<sup>59</sup> something closer to perversity was found to constitute maladministration where the local authority's computer system allowed an applicant for

housing accommodation to be registered as having a preference for both a type of property and an area when in fact there was no property of that type in that area.

It is more difficult to assign a specific designation to the maladministration which was identified in a report on an investigation into a complaint against *Cardiff City Council*,<sup>60</sup> although the grounds probably fall somewhere within the general category of *perversity* or *arbitrariness*. The essence of the complaint was that the local authority, having let the management of a riding school in one of its parks to its own Direct Services Organization as a result of a compulsory competitive tendering process, then undertook very selective enforcement of the byelaws which restricted the parking of motor vehicles adjoining the riding school. More particularly, non-enforcement occurred at times when events were being held at the riding school.<sup>61</sup>

The local authority's attitude was that the terms of the byelaws permitted parking in designated areas, and that the area in which the parking restrictions were not enforced during events were designated for that purpose. Additionally, the parking in question was not only subject to marshalling but was also justified on the ground that the riding school had to be run as a financially viable business. The local ombudsman took the view that compliance with the terms of the byelaws required there to be some formal procedure for designating areas, whereas in practice there was none. He also found it objectionable that the local authority should be enforcing the law on a selective basis which favoured its own commercial interests.<sup>62</sup>

### 3. Conclusion

Although they use different terminology, with judicial review referring to *Wednesbury* unreasonableness while the local ombudsman reflect the Crossman catalogue's ideas of perversity and arbitrariness (although by no means always using these terms explicitly), the evidence shows that both jurisdictions are willing to uphold challenges based on claims that the decision-making process lacks logical coherence. More particularly, therefore, the evidence supports the argument of this thesis that there is, in practice, a very substantial overlap between the activities of the courts and the local ombudsman.

### E: CONCLUSION

The evidence shows that, although the terminology employed by the courts and the local ombudsman may vary, as a matter of substance the local ombudsman is willing to investigate many complaints based on allegations which fall comfortably within the mainstream grounds of application for judicial review, namely *Wednesbury* irrelevance (or illegality), on the one hand and *Wednesbury* unreasonableness (or irrationality) on the other. Not surprisingly, at least in the *Wednesbury* unreasonableness (or irrationality) cases, the local ombudsman follows the courts into the apparently prohibited area of questioning the quality of the decisions, and not merely of the decision-making processes. Illicit though such questioning may be when regard is had to both the constitutional basis of the courts' jurisdiction and the statutory terms on which the local ombudsman exercises his jurisdiction, in practice it is inevitable given the nature of the grounds of challenge. In other words, the local ombudsman has followed the courts in developing an extended

jurisdiction, when he could, by sheltering behind the statute, have declined to investigate complaints which would inevitably require him to assess the quality of the decision itself.

This chapter has, therefore, furnished further evidence to support the argument of this thesis that there is a substantial overlap between the principles applied by the courts in judicial review and those applied by the local ombudsman.



<sup>1</sup> The discretion is conferred by the proviso to s.26(6) of the 1974 Act. See pp.57-60, above, for the statutory provision and the ombudsman's statement of his policy in relation to its application.

<sup>2</sup> [1947] 2 All ER 680.

<sup>3</sup> The final sentence in this quotation will be considered under *The Principle of Reasonableness in Operation*, below.

<sup>4</sup> See chapters 4 and 5, below.

<sup>5</sup> [1984] 3 All ER 935.

<sup>6</sup> At one time it was common to refer to failure to comply with procedural requirements specified by either statute or delegated legislation as being *procedural ultra vires*. This part of Lord Diplock's re classification simply serves to emphasize that breach of the requirements of fairness, irrespective of whether the requirement in question is statutory or common law in origin, can provide grounds for judicial review. (The common law requirements of fairness - or natural justice - are discussed in chapter 5, below.)

<sup>7</sup> For a significant dissent from one aspect of the revised terminology at least, see esp., *R. v. Devon County Council ex parte G* [1988] 3 All ER 1002, where Lord Donaldson MR said of the term "*Wednesbury* unreasonable":

"I eschew the synonym of 'irrational' because, although it is attractive as being shorter than '*Wednesbury* unreasonable' and has the imprimatur of Lord Diplock ... it is widely misunderstood by politicians, both local and national, and even more by

their constituents, as casting doubt upon the mental capacity of the decision-maker, a matter which in practice is seldom if ever in issue."

8 And certain other bodies specified in Sch.II to the Act.

9 See, s.71 of the Race Relations Act 1976.

10 See, *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694.  
11 [1950] 1 All ER 76.

12 88/A/0921.

13 For the Further Report, see McLeod, *Local Government Ombudsman: A Casebook*, 1993, p.1.

14 In the *Wednesbury* case (above).

15 (1919) 83 JP 41.

16 The decision of the House of Lords in *British Oxygen v. Minister of Technology* [1970] 3 All ER 165 is often cited alongside *ex parte Kynoch*, presumably because it possesses superior status in terms of the doctrine of binding precedent, as well as being more recent. In terms of content, however, *ex parte Kynoch* is more valuable because it also emphasizes the importance of deciding whether the policy is itself lawful.

17 (1991) 62 P & CR 334.

18 87/A/0638; McLeod, *Local Government Ombudsman: A Casebook*, 1993, p.165.

19 92/A/3559; (1994) 158 LG Rev 785.

20 87/A/0174; see, (1989) 153 LG Rev 585 for the Further Report.

21 The general principle is that the benefit of planning permission runs with the land.

<sup>22</sup> 92/C/1311; (1994) 158 LG Rev 609.

<sup>23</sup> 92/B/1340; (1994) 158 LG Rev 930.

<sup>24</sup> See p. 92, above.

<sup>25</sup> This non-interventionist attitude was without prejudice to the court's willingness to hold local authorities liable for negligence in respect of the way in which those inspections which did take place were actually undertaken.

<sup>26</sup> [1977] 2 All ER 492.

<sup>27</sup> Similarly, in *R. v. Greater London Council ex parte Royal Borough of Kensington and Chelsea* [1982] *The Times*, April 7, McNeill J commented, when faced with a challenge to the GLC's budget, that the issue was one "for the political hustings, and not for the court".

<sup>28</sup> [1943] 2 All ER 560.

<sup>29</sup> [1981] 1 All ER 1027.

<sup>30</sup> The fact that the Police Authority for the Metropolitan Police (i.e. the Home Secretary) is outwith the field of local government is irrelevant for the present purposes, since the case deals with the responsibility of the chief officer of police, rather than that of the Police Authority.

<sup>31</sup> [1968] 1 All ER 763.

<sup>32</sup> In *Crickitt v. Kursaal Casinos Ltd (No.2)* [1968] 1 All ER 139.

<sup>33</sup> [1973] 1 All ER 324.

<sup>34</sup> (1996) 93 LS Gaz 25.

- 35 The House of Lords has heard an appeal against this decision, but has not yet (17  
March 1997) delivered judgment.
- 36 90/C/2239; (1994) 158 LG Rev 314.
- 37 Although, in all the circumstances of the case, the local ombudsman concluded that  
there had been maladministration because the local authority had adopted a policy which  
had the effect of unduly influencing decisions in individual cases.
- 38 87/A/0889; (1988) 152 LG Rev 1013.
- 39 93/465; (1995) 159 LG Rev 207.
- 40 Under s.116, Local Government and Housing Act 1989.
- 41 Supplementary Credit Approvals are the mechanism by means of which central  
government (acting through the Department of the Environment, or the Welsh Office, as  
the case may be), controls local government borrowing.
- 42 91/A/1481; (1994) 158 LG Rev 173.
- 43 The parallel with *R. v. Gloucestershire County Council ex parte Barry* (see, p.91,  
above) is obvious.
- 44 88/C/1571 and 88/C/1821; (1991) 155 LG Rev 75.
- 45 92/C/1031; (1995) 159 LG Rev 198.
- 46 See, s.130, Highways Act 1980.
- 47 90/A/3188 and 91/A/0179; (1995) 159 LG Rev 270.
- 48 See, *R. v. Gloucestershire County Council ex parte Barry* - p.91, above.
- 49 In the *Wednesbury* case itself: see, pp.79-80, above.
- 50 [1984] 3 All ER 935.

<sup>51</sup> (1972) 116 Sol Jo 802.

<sup>52</sup> For further case-law on *Wednesbury* unreasonableness, see, e.g., McLeod, *Judicial Review*, 1993, pp. 109-119.

<sup>53</sup> Quoted in full at p.16, above.

<sup>54</sup> See pp. 94-95, above.

<sup>55</sup> 90/635; (1993) 157 LG Rev 124.

<sup>56</sup> 91/A/2064; (1993) 157 LG Rev 734.

<sup>57</sup> 93/C/1286; (1994) 158 LG Rev 806.

<sup>58</sup> The figures were 23,154 flats to 10,460 houses overall, and 425 suitable flats to 1,555 suitable houses.

<sup>59</sup> 93/C/1286; (1994) 158 LG Rev 806.

<sup>60</sup> 92/106; (1994) 158 LG Rev 630.

<sup>61</sup> There were 80 such occasions in 1993.

<sup>62</sup> The situation which arises where a decision-maker has an interest in the subject-matter of the decision is dealt with specifically in chapter 5.

## **CHAPTER 4**

### **FETTERING DISCRETION BY CONTRACT, ESTOPPEL AND LEGITIMATE EXPECTATION**

#### **A: INTRODUCTION**

As the previous chapter demonstrated, one aspect of the *Wednesbury* principle requires the decision-making processes of local authorities, in common with other public-sector decision-makers, to proceed by reference to the right considerations. This chapter will focus on one particular aspect of this proposition, namely the extent to which a local authority will be precluded from making a decision which would be inconsistent with a pre-existing obligation arising from either a contract or an estoppel. More particularly, it will compare the principles applied by the courts with those applied by the local ombudsman.

#### **B: FETTERING DISCRETION BY CONTRACT**

##### **1. Judicial Review<sup>1</sup>**

###### **(a) The Leading Cases**

The leading case is *Ayr Harbour Trustees v. Oswald*,<sup>2</sup> where the trustees of the harbour had the power to purchase land compulsorily in connection with their statutory function of maintaining and improving the harbour. Oswald owned a parcel of land adjoining the

harbour, and the trustees wished to buy some of this land. The problem was that if the land which Oswald was to retain were to become landlocked its consequential loss of value would significantly increase the compensation which he would receive. Accordingly, in an attempt to reduce the price they would have to pay, the trustees offered to agree that they would not use the land they were acquiring in such a way as to prevent the retained land from having access to the harbour. Oswald objected to this, and the House of Lords upheld his objection, on the ground that the trustees were under a duty to act for the benefit of the public, and in the future the public interest may require the use of the acquired land in such a way that Oswald's retained land would become cut off from the harbour. Any purported agreement which was incompatible with the future performance of this public duty would, therefore, be void.

The importance of the test of *incompatibility* was emphasized in *Stourcliffe Estates Ltd v. Bournemouth Corporation*,<sup>3</sup> where the corporation bought a piece of land from the company and covenanted to use it in performance of its statutory functions to provide a pleasure ground and open space. There were also detailed covenants restricting the kind of building which the corporation could erect. The corporation then wanted to build public conveniences on the land, close to the boundary with other land which the company retained and which it wished to develop for other purposes. When the company objected to the construction of the public conveniences, the corporation argued that the restriction was void, by analogy with the *Ayr Harbour* case.<sup>4</sup> The Court of Appeal held that the *Ayr Harbour* decision was irrelevant, because in the instant case there was no

incompatibility between the restriction on the use of the land and the performance of the statutory functions.

Further support for the proposition that incompatibility is the key concept in these cases can be drawn from the decision of the Court of Appeal in *Windsor & Maidenhead Borough Council v. Brandrose Investments Ltd.*<sup>5</sup> The facts were complicated and the law was less than straightforward, turning as it did to some extent upon the interpretation of the more obscure aspects of s.52 of the Town and Country Planning Act 1971.<sup>6</sup>

Basically, however, the facts were that the local planning authority entered into an agreement with the company relating to a scheme of development which included the demolition of some buildings. Before demolition took place, the local planning authority used its statutory powers to designate the area as a Conservation Area. One consequence of this designation was that demolition required the local planning authority's consent. The question therefore arose as to whether the local planning authority was bound by its prior agreement to permit the demolition which was involved in the scheme of redevelopment covered by the s.52 agreement.

The court held that the local planning authority could not disable itself from using its statutory powers to designate Conservation Areas. The reasoning underlying this conclusion was complicated by the s.52 element, but a distinction was drawn between implementation of the local planning authority's basic planning policy, in the form of the Development Plan, and the pursuit of other planning objectives. How far this conclusion depends on the s.52 element is not clear from the judgment of the court. Nevertheless,



irrespective of the s.52 point, the case can be seen as representing a version of the incompatibility argument by distinguishing between major and fundamental matters on the one hand, and minor and peripheral matters on the other, with the result that lawful fettering can take place only in relation to the latter category.

The final case which requires consideration when analysing the courts' attitude to the problem of public authorities binding themselves by agreement is *R. v. Hammersmith & Fulham London Borough Council ex parte Beddowes*.<sup>7</sup> A Conservative-controlled local authority owned an estate consisting of several blocks of flats which it wished to see renovated and improved, with a view to the flats being sold to owner occupiers. Lacking resources to enable it to achieve this objective itself, the local authority agreed to sell one of the blocks to a private developer, with the benefit of restrictive covenants. The effect of these covenants would be that all new lettings of flats on that part of the estate which the local authority would retain would be by way of long leases at a premium. In other words, no ordinary council tenancies would be created in the future. Viewed in the round, therefore, this scheme enabled the local authority to raise the capital to renovate the premises which it retained, while the private developer could re sell the flats which he had bought, and give his purchasers an assurance that the "quality of the neighbourhood" was improving. The scheme was, of course, politically highly contentious, and following a change in political control of the authority, one of the council's tenants on the estate applied for judicial review to quash the decision to accept the private developer's offer to buy the block of flats.

The Court of Appeal upheld the High Court's decision to dismiss the application. Concluding that the local authority's policy was rational and coherent, and therefore could not be characterised as *Wednesbury* unreasonable, the court said that the local authority's statutory power to dispose of land held for housing purposes carried with it an implied power to enter into covenants restricting the use of land which the local authority retained. The retained land was being held for the purpose of providing housing accommodation, and the local authority's policy that the accommodation should be made available on the basis of owner-occupation, rather than by way of council tenancies, was not inconsistent with that purpose. Furthermore, the present exercise of discretion was not rendered unlawful merely because the local authority, if subsequently constituted differently in party political terms, would find certain policy options were no longer available.

At the level of principle, the court indicated that if a statutory power is honestly and reasonably exercised in pursuit of a statutory objective, the exercise of that power could not be construed as an unlawful fetter on another power which existed for the same statutory purpose. In a case such as the instant one, therefore, the local authority could not change its mind without being in breach of contract; and this would give rise to an action for damages at least, with the possibility of an application for specific performance.

### **(b) Conclusion**

The courts refuse to treat a contract as binding where the effect would be to prevent the future performance of a public duty, while being willing to recognize bindingness in cases

where the future effect will merely flow from the purely practical consideration that what is done at one time may necessarily restrict what can be done subsequently.

## **2. The Local Ombudsman**

The effect of s.26 of, and paras.2 and 3 of Sch.V to, the Local Government Act 1974 is to disqualify the local ombudsman from investigating complaints relating to practically all contractual matters,<sup>8</sup> and therefore it is not surprising that there should be a dearth of comparative material dealing with situations comparable with those which arose in the *Ayr Harbour*<sup>9</sup> and *Bournemouth*<sup>10</sup> cases.

There is, however, material from both jurisdictions arising from the question of whether the applicant or the complainant should have been allowed to enter into a contractual relationship with the local authority, but these situations amount, in essence, to claims that *legitimate expectations* have been frustrated, and therefore they are best considered in that context.<sup>11</sup>

## **C: ESTOPPEL**

### **1. Judicial Review**

Where the conduct of a public sector decision-maker does not amount to entering into a contract, it may nevertheless be possible to argue that it is sufficient to raise an estoppel.<sup>12</sup> For the purposes of private law, where the doctrine originates, there are various classifications of estoppel, such as *common law* estoppel, *equitable* estoppel, *issue*

estoppel, and so on. However, for the present purposes it is sufficient to note Craig's point that:

"It may be best to regard estoppel as applied to public bodies as *sui generis*: it may refer to fact or intent, and may be suspensory or extinguish the right, depending upon the circumstances. *The one constant is that there would be no reason to apply the doctrine unless the representee suffered detriment.*" (Emphasis added.)<sup>13</sup>

At first sight it may seem obvious that where a statement or representation is made by, or on behalf of, a public body, in circumstances which would give rise to an estoppel if the situation were governed entirely by private law concepts, it will follow that an estoppel will arise in the ordinary way. However, if the statement or representation relates to something which is *ultra vires* the public body, the effect of allowing an estoppel to operate would be to enable the body to extend its own powers by no more than a mere assertion. On the other hand, if the law accepts the legitimacy of this objection to recognising an estoppel, the innocent representee suffers.

The basic problem may be illustrated by the Privy Council case of *Maritime Electric Co v. General Dairies Ltd.*<sup>14</sup> The electricity company had a statutory duty to charge a particular price for its electricity, but nevertheless over a period of two years, it actually charged one customer only 10% of the correct price. When the company sued the customer for the balance of the price, the customer argued that an estoppel had arisen.

Refusing to recognise an estoppel, the Privy Council emphasized the statutory duty aspect of the case. More particularly, Lord Maugham said:

"Estoppel is only a rule of evidence ... [and] ... it cannot therefore avail ... to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part."

The leading modern case on estoppel is *Western Fish Products Ltd v. Penwith District Council*,<sup>15</sup> which decided, in the light of a substantial body of case-law, that there was a distinction to be drawn between those situations (such as that which arose in the previous case) where it was held that an estoppel could not prevent the performance of a public duty, and those situations in which it was argued merely that a public body could be estopped from insisting on pure formalities. In all the circumstances of the instant case, the Court of Appeal held that there was no estoppel anyway (because there had been neither a sufficient representation nor any detrimental reliance), but speaking at the level of principle, Megaw LJ said:

"If a planning authority waives a procedural requirement relating to any application made to it for the exercise of its statutory powers, it may be estopped from relying on the lack of formality."

Although the facts of the case were such that this statement is expressed in terms of *planning* authorities, it is plainly of general application.

Briefly, therefore, the courts have developed an attitude which allows estoppel to operate in order to protect the interests of the subject provided the effect is not to prevent the performance of a public duty. Where this would be the effect, however, the public interest prevails, and no estoppel will operate.

## **2. The Local Ombudsman**

As the next section will show, the courts now tend to apply the concept of legitimate expectation to cases which they would previously have decided on the basis of estoppel. Since legitimate expectation is the more modern doctrine, it is perhaps not surprising that the local ombudsman's reports tend to reflect an attitude shaped more by that doctrine than by the older, more formal and more technical doctrine of estoppel, although it must be said that the reports tend not to rely explicitly on either doctrine, being based rather on propriety or fairness.

Whatever terminology is used, the relevant local ombudsman reports sit more comfortably under the heading of legitimate expectation, and therefore they will be considered there.

## **D: LEGITIMATE EXPECTATION**

### **1. Judicial Review**

In recent years, cases which would once have been argued and decided in terms of estoppel have tended to be seen in terms of *legitimate expectation*. The links between the two doctrines emerge clearly from *R. v. Jockey Club ex parte RAM Racecourses Ltd*,<sup>16</sup> where Stuart-Smith LJ and Simon Brown J both said that in order to succeed on the basis of legitimate expectation, an applicant for judicial review would have to establish the following matters: that there had been a clear and unambiguous representation; if the representation was not made directly to the applicant, that he was within a class of persons entitled to rely on the representation, or that it was reasonable for him to rely on it; that the applicant did, in fact, rely on the representation; that the applicant's reliance on the representation was to his detriment; and that there was no overriding interest, arising from their duties and responsibilities which entitled the decision-maker to change its policy to the detriment of the applicant.

More recently, however, in *R. v. Secretary of State for the Home Department ex parte Jaramillo-Silva*,<sup>17</sup> the Court of Appeal has significantly relaxed the doctrine, by emphasizing its basis:

"Reliance and detriment are not necessarily required in every legitimate expectation case. But ... it is certainly necessary for the applicant to establish that it was *unfair*

*or inconsistent with good administration* [to allow the decision-maker to depart from a representation which it had made]". (Emphasis added.)

The idea of legitimate expectation generally is well illustrated by *Re Liverpool Taxi Owners' Association*,<sup>18</sup> which is one of the earliest cases in which the doctrine was articulated. The facts were that the local authority proposed to increase the number of taxi cab licences which it issued. The cab *owners* wanted the number of licences to remain static, but the cab *drivers* wanted the number to be increased to enable them to compete more effectively with mini-cabs. The corporation told the cab owners that full consultation would precede any decision on the question of an increase. Thereafter, the corporation again began to think in terms of an increase, but the chairman of the relevant committee said that no increase would take place before the corporation had obtained Private Act powers to control mini-cabs. When the corporation was advised that the chairman's undertaking was not binding, the cab owners applied for judicial review to prevent the increase from taking place. Having lost in the High Court, they succeeded in the Court of Appeal, which held that full consultation was required. The court also held that the chairman's undertaking should be honoured, unless - as was not the case here - it conflicted with the performance of a statutory duty. The chairman's undertaking had created a legitimate expectation on the part of the cab owners that there would be full consultation before a decision was made.

More specifically, the proposition that the doctrine of legitimate expectation is based on fairness may be illustrated by *R. v. Enfield London Borough Council ex parte T.*



*F. Unwin (Roydon) Limited*.<sup>19</sup> A local authority suspended one of its contractors in consequence of a private transaction between the contractor and one of the local authority's employees. The High Court held that because the contractor had been on the authority's approved list for a long time, and there had been no previous complaints which would justify removal from the list, the contractor had a legitimate expectation of fair treatment over and above the specific provisions as to the giving of reasons contained in s.20 of the Local Government Act 1988.

Disputes as to whether a genuinely held expectation is also legitimate will be resolved by reference to an objective test. In *R. v. Swale Borough Council and Another ex parte Royal Society for the Protection of Birds*<sup>20</sup> the applicant for judicial review claimed, *inter alia*, to have had a legitimate expectation that it would be consulted during the decision-making process on a complex scheme of land reclamation. The difficulty arose over a misunderstanding between the parties as to precisely which decision would be preceded by consultation. Having had no difficulty in holding that a promise of consultation creates a legitimate expectation, the High Court went on to hold that where there is a genuine and reasonable misunderstanding of the kind in question, the court must adopt the position of the reasonable bystander.

Although the case of *R. v. Lancashire County Council ex parte Telegraph Service Stations Ltd*<sup>21</sup> was not argued explicitly in terms of legitimate expectation, this doctrine was (implicitly at least) at the heart of the matter to be decided. The facts were that a local authority put a piece of land on the market as a result of pressure from X that it should do so. It then provisionally accepted an offer from Y, following which it received a

higher offer from X. A sub-committee resolved to proceed with the sale to Y. Stated narrowly, the specific question of law was whether the local authority was obtaining the best price reasonably obtainable, as it was required to do under s.123(2) of the Local Government Act 1972. Quashing the sub-committee's decision to proceed with the sale to Y, McCowan J said that the local authority should have weighed the ethical and commercial factors against each other, rather than regarding the ethical factors, which they saw as being all in favour of Y, as being determinative of the issue.

Finally, for the avoidance of doubt, it is worth noting that mere inconsistency with an earlier decision will not necessarily justify a challenge based on frustration of a legitimate expectation. In *R. v. Birmingham City Council ex parte Sheptonhurst Ltd*<sup>22</sup> the question was whether a local authority could lawfully refuse to renew expiring sex shop licences.<sup>23</sup> The local authority's apparent difficulty was that there had been no change in the circumstances of the areas in which the shops were situated since the grant of the previous licences. The court acknowledged that when considering an application for renewal of a sex shop licence, a local authority must have regard to the fact that a licence has previously been granted. However, the court also noted that Parliament must be aware that a local authority is a body of changing composition and shifting opinion, whose changes and shifts reflect the views of the local electorate. It followed that the previous decision in favour of the sex shop proprietors could be no more than one consideration to be put into the balance alongside all other relevant matters.

Briefly, therefore, by placing the emphasis on fairness, the courts have developed a flexible doctrine of legitimate expectation, without losing coherence. By way of contrast,

the next section will show that the local ombudsman's approach is less than totally coherent.

### 3. The Local Ombudsman

To begin with a clear example of the local ombudsman adopting a similar approach to that of the courts, it is appropriate to consider the report of an investigation into a complaint against *Bolsover District Council*.<sup>24</sup> The local ombudsman found no maladministration where planning permission was granted in respect of a proposal which had previously been rejected, because the different results were accounted for by significant changes in the composition of the committee between the two decisions. This is, of course, entirely consistent with the view of the High Court in *ex parte Sheptonhurst Ltd*.<sup>25</sup>

However, the local ombudsman took a different view in the report of an investigation into a complaint against *Leicester City Council*,<sup>26</sup> where he concluded that the local authority was bound by an undertaking which its predecessor had given in 1962. The undertaking was to the effect that certain land would remain undeveloped, but in subsequent decades it became clear that, despite the undertaking, the local authority wanted to see the land developed, and the draft Development Plan reflected this. The local ombudsman concluded that departure from the undertaking would be

"a gross breach of a solemn promise and should not be undertaken. The city must pursue whatever means are available to them in the courts and Parliament to remove the restraint if that is the city's wish."

The proposition that it would be wrong to breach the undertaking was underlined by the local ombudsman's view that if such a breach were to occur, the local authority should compensate the owners of property which depreciated in value as a result.

In two other reports, however, the local ombudsman has accepted that a local authority is entitled to act inconsistently, provided it pays compensation. In the report on an investigation into a complaint against *Bristol City Council*<sup>27</sup> the local ombudsman dealt with a situation in which the local authority, being anxious to see certain property converted and refurbished in order to provide residential accommodation, agreed to pay a developer a sum in excess of £245,000 by way of improvement grant. Following a change of political control, the local authority refused to proceed with the grant. The local ombudsman concluded that:

"Local authorities are entitled to change their mind for political as well as other reasons. However, if they do they must bear the consequences. The relationship between the developer and the council was one of partnership in fact, even if it did not amount to one in law. It was a council-led scheme and the council effectively pulled out at the eleventh hour."

In practical terms, this meant that the developer should be compensated for the abortive expenditure which it had incurred in connection with the scheme.

The local ombudsman took a similar view in the report of an investigation into a complaint against *Tower Hamlets London Borough Council*.<sup>28</sup> The facts were that the local

authority was divided for administrative purposes into smaller units known as "neighbourhoods". One neighbourhood had agreed in principle to sell a particular site to a doctor, who would then develop it as a surgery/health centre. The terms of the transaction had been agreed and both parties had instructed solicitors. By this stage the doctor had incurred preliminary expenditure of approximately £15,000. Political control of the neighbourhood then changed. The incoming party wished to retain the site for "possible future housing community use", and accordingly the doctor was offered another site. On the way to concluding that the local authority should compensate the doctor for his abortive expenditure in connection with the first site, the local ombudsman cited his own *Annual Report for 1984-85*:

"Councils as political bodies make political decisions; they are entitled to change their policies and will often do so, especially when the political control of the council alters ... but if any persons have taken action in reasonable reliance on previous policies and because of the change have necessarily incurred abortive expenses or professional costs, or have irrevocably changed their circumstances, good administration requires either that they should be excluded from the change in policy or that they should be compensated for their loss or expense."

In respect of both the *Bristol* and the *Tower Hamlets* reports, it is difficult to see how the local authority can sensibly be said to be *entitled* to change its mind, and yet be under an obligation to pay compensation when it does so, since the payment of

compensation is typically appropriate in respect of harm suffered in consequence of some wrong-doing. Furthermore, the view that changes in political control justify local authorities in changing decisions which have already been made, reflects a clear divergence from the attitude of the court in the contract case of *R. v. Hammersmith & Fulham London Borough Council ex parte Beddowes*.<sup>29</sup>

There is a clear parallel between the facts giving rise to *R. v. Lancashire County Council ex parte Telegraph Service Stations Ltd*<sup>30</sup> and those dealt with in the local ombudsman's report on an investigation into a complaint against *Kirklees Metropolitan Borough Council*,<sup>31</sup> where the local authority advertised a piece of land as being available for sale. In due course, the relevant sub-committee agreed to sell the land to X, following receipt of an officers' report which indicated that X had made an offer of £11,000, but which made no mention of the fact that an agent had clearly indicated that one of his clients, Y, was seriously interested in buying the property. When Y's interest matured into an offer of £15,000, X was allowed to match it, and the land was sold to him. Upholding Y's complaint, the local ombudsman attached significance to the fact that the sub-committee which had initially agreed to sell the land to X had not known that there was other serious interest in the property, because from that point onwards the local authority considered itself morally bound to sell to X. The local ombudsman concluded that the local authority should compensate Y for his abortive expenditure.

Despite the clear similarity between this fact-situation and that which gave rise to the *Lancashire County Council* case,<sup>32</sup> it is also possible to distinguish them. In the first situation, the land was put on the market only as a result of pressure from the aspiring but

disappointed purchaser, whereas in the second situation not only did the local authority market the land spontaneously, but also it did ultimately receive full value for the land. Nevertheless, in both cases the crucial matter was that the local authority was taken to have erred in its perception that the moral situation led to the conclusion that all the merit was on one side, rather than approaching both parties in a more even-handed manner.<sup>33</sup>

#### 4. Conclusion

The courts have developed a consistent doctrine of legitimate expectation which will in most cases produce the same results as the now unfashionable doctrine of estoppel would do, although the emphasis on fairness rather than formality, which emerges from the decision in *R v. Secretary of State for the Home Department ex parte Jaramillo-Silva*<sup>34</sup> shows a willingness to be flexible in order to meet the court's perception of the needs of justice in individual cases.

The local ombudsman takes the same view as the courts in some situations, as evidenced by the *Bolsover* report<sup>35</sup> and *R. v. Birmingham City Council ex parte Sheptonhurst Ltd.*<sup>36</sup> On the other hand, the conclusion in the *Leicester* report,<sup>37</sup> that the local authority should not go back on its predecessor's undertaking when preparing the draft Development Plan, is at odds with *Windsor & Maidenhead Borough Council v. Brandrose Investments Ltd.*<sup>38</sup> which accords primacy to the public interest in seeing that plan implemented.<sup>39</sup> By way of contrast, the local ombudsman has not yet produced a totally consistent view. More particularly, it is difficult to see why a local authority should be required to pay compensation in respect of actions which it is entitled to take.

## **F: CONCLUSION**

This chapter provides further evidence to support the argument of this thesis that there is substantial overlap between the activities of the courts in judicial review and those of the local ombudsman, although it has also disclosed some discrepancies between the two approaches.

The evidence clearly shows that both the courts and the local ombudsman accept the general desirability of consistency in decision-making, while at the same time recognising that there are some circumstances in which the retention of flexibility is even more desirable. More particularly, both accord priority to the retention of flexibility in instances such as those which gave rise to the complaint against Bolsover District Council,<sup>40</sup> and the application for judicial review in respect of Birmingham City Council's sex shop licensing decisions,<sup>41</sup> where the decision-makers are democratically elected, and may, therefore, be said to be subject to a relatively direct form of political accountability.

It is, however, difficult to assess the local ombudsman's attitude fully, since his reports sometimes disclose a lack of consistency in terms of the most fundamental principles of entitlement to do things and liability for loss occasioned by doing them.



<sup>1</sup> Many of the leading judicial authorities pre-date the modern use of judicial review and are, therefore, contained in other types of proceedings. However, the principles which those cases establish are of equal relevance to judicial review.

<sup>2</sup> (1883) App Cas 623.

<sup>3</sup> [1910] 2 Ch 12.

<sup>4</sup> There were also arguments based on the detailed wording of the covenants, but these are irrelevant for the present purposes.

<sup>5</sup> [1983] 1 All ER 818.

<sup>6</sup> Planning agreements were renamed "planning obligations" by the Town and Country Planning Act 1990, and are now governed by that Act, as amended by the Planning and Compensation Act 1991.

<sup>7</sup> [1987] 1 All ER 369.

<sup>8</sup> See, p.15, above.

<sup>9</sup> See, p.109, above.

<sup>10</sup> See, p.110, above.

<sup>11</sup> See pp.118, *et seq*, below.

<sup>12</sup> The doctrine of estoppel states that where one person has made a representation on which another person has relied to his detriment, the person who made the representation cannot go back on it.

<sup>13</sup> *Administrative Law*, 3rd edn, 1994, p.653, n.3

<sup>14</sup> [1937] 1 All ER 748.

<sup>15</sup> [1981] 2 All ER 204.

16 (1991) 3 Admin LR 265.

17 (1995) 7 Admin LR 445.

18 [1972] 2 All ER 589.

19 (1989) 153 LG Rev 890.

20 [1990] 1 All ER 1026.

21 (1989) 153 LG Rev 510.

22 [1990] 1 All ER 1026.

23 The sex shop licensing system is contained in the Local Government (Miscellaneous Provisions) Act, 1982.

24 91/C/1515.

25 See, p.121, above.

26 88/B/0070; McLeod, *Local Government Ombudsman: A Casebook*, 1993, p.148.

The local authority's refusal to accept this Report resulted in a Further Report - see, (1991) 155 LG Rev 176 - which is cited at p.13, above.

27 87/B/1007; McLeod, *Local Government Ombudsman: A Casebook*, 1993, p.135.

28 91/A/1615; (1993) 157 LG Rev 48.

29 See, p.112, above.

30 See, p.120, above.

31 90/C/1863; (1992) 156 LG Rev 873.

32 See, p.120, above.

33 The topic of disposal of land generally is dealt with in the local ombudsman's *Guidance on Good Practice No.5*, published in 1995.

<sup>34</sup> See, p.118, above.

<sup>35</sup> See, p.122, above.

<sup>36</sup> See, p.121, above.

<sup>37</sup> See, p.122, above.

<sup>38</sup> See, p.111, above.

<sup>39</sup> It is submitted that the fact that the *Windsor & Maidenhead* case arose from an agreement, while the complaint giving rise to the *Leicester* report was based on an undertaking, does not affect the issue of principle as to a local authority's freedom to act in the public interest.

<sup>40</sup> See, p.122, above.

<sup>41</sup> See, p.121, above.

## **CHAPTER 5**

### **NATURAL JUSTICE AND FAIRNESS**

#### **A: INTRODUCTION**

This chapter will discuss those grounds for judicial review which are found in the common law principles governing the requirement of fairness in decision-making, and then consider the local ombudsman's approach to similar situations, including those arising under the *National Code of Local Government Conduct*. The statutory provisions requiring councillors and officers to declare their pecuniary interests<sup>1</sup> will not be discussed since their enforcement is by way of prosecution rather than judicial review,<sup>2</sup> and is, therefore, beyond the scope of this thesis.

The court cases and ombudsman's reports discussed in this chapter will present further evidence in support of the argument of this thesis that there is substantial overlap in practice between the jurisdictions of the courts and the local ombudsman.

#### **B: JUDICIAL REVIEW**

##### **1. Fairness in Relation to Judicial Review Generally**

Although there is a sense in which the whole concept of judicial review is based on securing a degree of procedural fairness, English law has for centuries<sup>3</sup> developed a discrete doctrine which has traditionally been labelled "natural justice". The doctrine has also been

described<sup>4</sup> as "fair play in action", and Lord Diplock has even suggested that it should simply be labelled *fairness*, under which guise it should be regarded as one of the major strands of procedural propriety.<sup>5</sup> However, nothing turns on the labelling:

"It is now clearly settled, as is indeed self-evident, that there is no difference between 'natural justice' and 'acting fairly', but that they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power [which the decision-maker is exercising] and the circumstances of the case." <sup>6</sup>

The fact that the existence of the doctrine is well-established does not mean that its applicability and content have always been similarly beyond question in every case. As Tucker LJ said in *Russell v. Duke of Norfolk*:<sup>7</sup>

"[The requirements of natural justice] must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal [*sc.* the decision-maker] is acting, the subject-matter that is being dealt with, and so forth."

Nevertheless, there are undoubtedly two broad headings under which the doctrine operates, namely the right to a hearing (or *audi alteram partem*) and the rule against bias (or *nemo iudex in sua causa potest*). Additionally, the topics of giving reasons for decisions and of consultation with people who will be affected by decisions are

sometimes said by the courts to fall within the general concept of "fairness", even though they fall outwith the doctrine of natural justice.

Each of these matters will be elaborated and illustrated in the context of judicial review, before turning to the local ombudsman's approach to comparable situations.

## **2. The Right to a Hearing - *Audi Alteram Partem***

Any discussion of the right to a hearing must begin with the observation that, despite the apparent meaning of the term "hearing", it is well-established that orality is by no means always necessary. All that is required is the opportunity to put one's case.<sup>8</sup> It might seem obvious that the right to a hearing necessarily carries with it the right to receive adequate notice of the hearing, since a hearing which is not preceded by sufficient time to allow for the preparation of the case is tantamount to the denial of a hearing altogether. In practice, however, the courts view cases of failure to give notice differently according to whether the failure results from fault on the part of the decision-maker.<sup>9</sup>

In *Glynn v. Keele University*<sup>10</sup> the High Court found a breach of natural justice where notification of disciplinary proceedings was sent to a student's term-time address after he had gone down for the long vacation.<sup>11</sup> However, it is important to note that the reasoning in the case turned on the fact that it would have been easy for the notice to have been sent to both the student's home and college addresses. In other words, the case is not an example of non-notification *simpliciter*, but of non-notification caused by fault on the part of the decision-maker. The importance of this distinction is illustrated by *Al-Mehdawi v. Secretary of State for the Home Department*<sup>12</sup> where the Home Secretary gave a

deportee's solicitors notice of a hearing which was central to the deportation procedure, but due to a breakdown in communication between the solicitors and the deportee, the latter was not informed. The House of Lords held that there had been no breach of natural justice, since the non-notification was not the decision-maker's fault.

### **3. The Rule Against Bias - *Nemo Iudex in Sua Causa Potest***

#### **(a) Introduction**

Although it is self evident that the idea of fairness requires an absence of bias on the part of the decision-maker, the task of deciding what constitutes bias can raise significant difficulties in practice. An important preliminary, however, is to note that a finding of bias is by no means synonymous with a finding of dishonesty. As Devlin LJ said in *R. v. Barnsley Licensing Justices ex parte Barnsley & District Licensed Victuallers' Association*:<sup>14</sup>

"Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

#### **(b) The Tests for Identifying Bias**

Traditionally, English law has used two tests for identifying bias, namely *reasonable suspicion*, and *real likelihood*. The application of these two tests caused a great deal of

confusion. All that could be said with any certainty was that the use of the *reasonable suspicion* test was more likely to produce a finding of bias, while the use of the *real likelihood* test was less likely to do so.<sup>15</sup>

In *R. v. Gough*<sup>16</sup> the House of Lords sought to clarify the test for bias. The appellant had been convicted of conspiring with his brother to commit certain robberies. One of the jurors was the next-door-neighbour of the brother who was not tried. The House of Lords refused to intervene, saying that in all cases of alleged bias the test to be applied was whether, having regard to all the relevant circumstances, there was a real danger of injustice resulting from the bias. Moreover, the same test was applicable whether the decision-maker was a bench of justices, an inferior tribunal, a jury or an arbitrator. In a case involving an allegation of bias on the part of a justices' clerk, the court should go further and consider whether the clerk had been invited to advise the justices, and, if so, whether there was a real danger of the clerk's bias having infected the views of the justices to the detriment of the person concerned.

Lord Woolf specifically acknowledged that cases involving pecuniary or proprietary interests<sup>17</sup> were in a category of their own, but considered the creation of any other special categories to be undesirable.

While *R. v. Gough* was clearly intended to simplify the law relating to bias, its effect was to create a further period of uncertainty. The difficulty was that although the House said the uniform test was to be applied in all cases except those involving pecuniary interests, the examples which were given were all drawn from judicial, or quasi-judicial, contexts. It would, therefore, be consistent with the first principles of legal method for



subsequent courts to confine the uniform test to those contexts. However, in *R. v. Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd*,<sup>18</sup> Sedley J said there was

"nothing in the jurisprudence of *R. v. Gough* which necessarily limited to judicial and quasi-judicial tribunals the rule against participation of a person with a personal interest in the outcome"

and that, as a matter of principle, it should not be limited in that way

"because in the modern state the interests of individuals or of the public might be more radically affected by administrative decisions than by the decisions of courts and judicial tribunals."

This decision has endorsed the simplifying effect of *R. v. Gough* in terms of the formulation of the test for bias, but the application of the concept to specific facts remains problematic, as the case of *R. v. H.M. Coroner for Inner West London ex parte Dallaglio and Lockwood-Croft*<sup>19</sup> shows. A coroner dealing with a large-scale disaster involving over 50 deaths, had refused to re-open an inquest which he had previously adjourned, despite having been subjected to considerable pressure from the relatives of some of the deceased to do so.<sup>20</sup> When giving an interview to a journalist, he described the mother of one of the deceased as "unhinged". Both the High Court and the Court of Appeal agreed that the

*R. v. Gough* test of *real danger* was applicable, but on the facts the High Court did not find that test satisfied whereas the Court of Appeal did, saying that the coroner's choice of vocabulary was not merely injudicious and insensitive, but was bound to be interpreted both as a gratuitous insult, and as an indication that the coroner regarded the mother as unreliable.

The test of *real danger* is, therefore of very widespread application, but it will be remembered that, in *R. v. Gough* itself, Lord Woolf acknowledged that cases where the decision-maker has a pecuniary interest in the decision remain in a category of their own, and therefore this category must now be considered.

### **(c) Bias and Pecuniary Interests**

The classic case where a finding of bias stemmed from the decision-maker's pecuniary interest in the subject matter of the decision is *Dimes v. Grand Junction Canal Co.*<sup>21</sup> The parties had been involved in a long series of cases, and on three occasions the Lord Chancellor, Lord Cottenham, was on the bench. Dimes subsequently discovered that Lord Cottenham held shares in the company. The House of Lords held that this was a breach of natural justice, even though no-one would seriously think that the Lord Chancellor's judgment had been affected. Similarly, in *R. v. Rand*<sup>22</sup> Blackburn J said:

"There is no doubt that any direct pecuniary interest, however small ... does disqualify a person from acting as a judge in the matter."<sup>23</sup>

However, there is some, more modern, evidence that the courts may adopt a more relaxed attitude. In *R. v. Mulvihill*<sup>24</sup> a judge who was hearing charges involving conspiracy to rob certain banks and building societies failed to disclose his ownership of 1650 shares in one of the banks. The Court of Appeal, being called upon to decide whether this shareholding constituted a breach of the rule against bias, said that the judge had had no direct pecuniary interest in the outcome of the criminal proceedings, and therefore the principle of automatic disqualification did not apply. It is significant to note that Brooke J, giving the judgment of the court, drew a distinction between the role of the judge in a jury trial, and the role of a lay justice:

"A lay justice ... is one of the primary decision-makers in summary proceedings in a magistrates' court; and although [the judge] had to make direct decisions on the admissibility of evidence during the course of trials within a trial, we do not consider that the hypothetical reasonable bystander would reasonably suspect that it was not possible for him to reach a fair decision because of the existence of his shareholding."

The implication that a stricter test (presumably expressed in more traditional terms) will be appropriate in cases decided by lay magistrates is clear. The courts have not yet had the opportunity to say whether a similarly strict test would be appropriate where the decision makers are councillors, but evidence to suggest that this may be so may be

derived from a comparison with the judicial approach to the provisions which impose criminal liability on councillors who fail to declare pecuniary interests.<sup>25</sup>

#### **4. Giving Reasons for Decisions**

Although a requirement that decision-makers should give reasons for their decisions did not (and still does not) form part of the traditional doctrine of natural justice, the courts are becoming increasingly aware that in some cases such a requirement may contribute to the overall requirement of fairness in various ways. In the words of Sedley J:

"The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process."<sup>26</sup>

In the same case, however, Sedley J recognized that a requirement to give reasons might not be universally appropriate:

"On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. It is the relationship of these and other material considerations to the

nature of the particular decision which will determine whether or not fairness demands reasons.

"In the light of such factors each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite ... No doubt the common law will develop, as the common law does, case by case. It is not entirely satisfactory that this should be so, not least because experience suggests that in the absence of a prior principle irreconcilable or inconsistent decisions will emerge. But from the tenor of the decisions principles will come, and if the common law's pragmatism has a virtue, it is that these principles are likely to be robust."

The question of whether there is a legal requirement to give reasons must, therefore, be decided on a case-by-case basis.

## **5. Conclusion**

The courts use the doctrine of natural justice as a well-established and flexible means of imposing at least a minimum standard of procedural fairness on decision-makers.

## **C: THE LOCAL OMBUDSMAN**

### **1. Fairness in Relation to the Local Ombudsman Generally**

The local ombudsman's function shares with judicial review the general aim of providing a remedy for procedural unfairness. It is, therefore, not surprising that the local ombudsman has developed the concept of maladministration with consequential injustice in much the same way as the courts have developed the concept of natural justice, and that a substantial proportion of complaints to the local ombudsman arise from situations involving the same kind of specific unfairnesses as those which give rise to applications for judicial review.

### **2. The Right to a Hearing**

The report into an investigation on a complaint against *Wirral Metropolitan Borough Council* <sup>27</sup> provides a striking parallel with the case of *Al-Mehdawi*.<sup>28</sup> The complaint involved a child's exclusion from school, coupled with the local education authority's failure either to take proper steps to provide an alternative place or to enable an appeal to be made against the exclusion. The school sent the child's mother two letters informing her that the child had been excluded, and that no date had been set for her re-instatement, but that the governors were going to consider indefinite exclusion. The local education authority wrote to her asking for her comments before a decision was taken as to when the child should return to school. The local ombudsman had no evidence on which to reject the mother's claim that she did not receive any of these letters, but refused to say that the fact that she

may not have done so was the result of any maladministration by the local education authority.

### **3. The Rule Against Bias**

Much of the local ombudsman's work in relation to bias centres on the *National Code of Local Government Conduct*,<sup>29</sup> but some points may be made from a broader perspective

The first *National Code of Local Government Conduct* was introduced in 1975 on an extra-legal basis. In 1986 the Widdicombe Report<sup>30</sup> recommended that the Code should be revised and put on a statutory footing, with councillors having to agree to abide by it when they make their declaration of acceptance of office. This was implemented by the Local Government and Housing Act 1989,<sup>31</sup> and a revised code was issued in 1990.<sup>32</sup>

As a matter of law, no remedy arises from a breach of the Code *per se* - unless the circumstances constituting the breach would give rise to a remedy anyway - but para.9 of the Circular under cover of which the Code was issued, provides that the local ombudsman may regard a breach as being maladministration.

Paragraph 8 of the Code reminds councillors of the legal provisions relating to disclosure of pecuniary interests, and paras.9 to 12 go on to deal with non-pecuniary interests and their consequences. Paragraphs 15 to 18 explain that, by analogy with the provisions relating to pecuniary interests, it may still be proper for a councillor to continue to take part, notwithstanding a relevant interest.

A number of reports illustrate the local ombudsman's use of the Code. In the report into an investigation on a complaint against *Melton Mowbray Borough Council*,<sup>33</sup>

the local ombudsman said that where an applicant for planning permission is a freemason, any councillor dealing with that application who is not only a freemason but is also a member of the same lodge as the applicant, should consider himself to have a non-pecuniary interest in the determination of the application.

In the report into an investigation on a complaint against *Kirklees Metropolitan Council* <sup>34</sup> the local ombudsman took the view that there was no pecuniary interest within the meaning of the 1972 Act where a councillor's spouse was receiving a pension from an applicant for planning permission,<sup>35</sup> but that the Code applied nevertheless, because the existence of the connection could result in other people thinking that the councillor was acting from personal motives.

It is clear, therefore, that the Code takes a broad view of what amounts to a disqualifying interest, but the local ombudsman has nevertheless found maladministration where the interest in question has fallen outside the scope of the Code. For example, the complaint against *Holderness Borough Council* <sup>36</sup> arose where a planning officer had recommended approval of planning permission for certain proposed development on land adjoining his own house. The applicant for planning permission was also the barber who cut the planning officer's hair. When the application was granted, a neighbour complained to the local ombudsman, alleging failure to declare interests on the part of both the planning officer and a member of the committee. On the facts, the local ombudsman rejected the allegation against the member. With regard to the planning officer, the local ombudsman took no objection to existence of the barber-customer relationship, but did say that the



planning officer should have taken no part in the processing of the application, even though his recommendation was, if anything, against his own interest.<sup>37</sup>

#### **4. Giving Reasons for Decisions**

The local ombudsman considers the giving of reasons to be one of the requirements of good administration. By way of example, there was a finding of maladministration where *Barking & Dagenham London Borough Council* failed to give reasons for not selecting an applicant for housing accommodation.<sup>38</sup>

There is no evidence in the local ombudsman's reports that he is following the courts in taking a more relaxed view of bias, and indeed, unless there is a revision of the *National Code of Local Government Conduct*, it is difficult to see how he could do so.

#### **D: CONCLUSION**

This chapter has demonstrated that there is very substantial overlap between the activities of the courts in judicial review and those of the local ombudsman. Both share a recognition of the importance of being given notice of allegations before it is decided whether they have been substantiated, as well as the importance of decision-makers being free from bias. As far as the test for bias is concerned, the courts now apply the "real danger" test, but the local ombudsman has not followed suit.

In relation to the giving of reasons, the distinction between the two jurisdictions is that the local ombudsman requires the giving of reasons as a matter of course, whereas

the courts require some particular evidence that the demands of fairness require that reasons should be given.

Overall, therefore, despite their basic similarities, there are important respects in which the local ombudsman requires a higher standard of conduct from local authorities than that which might satisfy the courts.

<sup>1</sup> See ss.94-98, Local Government Act 1972 and s.106, Local Government Finance Act 1992 for members; and s.105, Local Government Act 1972 for officers.

<sup>2</sup> An important consequence of this distinction is that a criminal conviction for breaching the duty of disclosure of interest does not affect the validity of the decision.

<sup>3</sup> See, e.g., *Dr. Bentley's Case* (1723) 1 Str 557, cited further at n.9, below.

<sup>4</sup> By Harman LJ at the Court of Appeal stage of *Ridge v. Baldwin*.

<sup>5</sup> See the *GCHQ* case, p.5, above.

<sup>6</sup> Wade and Forsyth, *Administrative Law*, 7th edition, 1994, p.515.

<sup>7</sup> [1949] 1 All ER 109.

<sup>8</sup> The leading case on the circumstances in which orality is necessary is *R. v. Army Board of the Defence Council ex parte Anderson* [1991] 3 All ER 375.

<sup>9</sup> The law has developed, therefore, since *Dr. Bentley's Case* (1723) 1 St 557, where Fortescue J said:

"The objection for want of notice can never be got over ... even God himself did not pass sentence upon Adam before he was called upon to make his defence." (The question of the serpent's entitlement to natural justice presumably depends on one's view of animal rights!)

<sup>10</sup> [1971] 2 All ER 89.

<sup>11</sup> The fact that the court exercised its discretion to withhold a remedy, on the ground that the result of the disciplinary proceedings which took place in the student's absence was perfectly proper, does not detract from the significance of the case in the present context.

<sup>12</sup> (1989) 2 Admin LR 267.

<sup>14</sup> [1960] 2 All ER 703.

<sup>15</sup> For a discussion of the leading authorities, see, e.g., McLeod, *Judicial Review*, pp. 200-206.

<sup>16</sup> [1993] 2 All ER 724.

<sup>17</sup> See, p.137, above.

<sup>18</sup> [1996] *The Times*, March 20.

<sup>19</sup> (1995) 7 Admin LR 256.

<sup>20</sup> The coroner felt that re-opening the inquest was unnecessary because various other legal proceedings and inquiries into the accident had occurred.

<sup>21</sup> (1852) 3 ILL Cas 759.

<sup>22</sup> (1866) LR 1 QB 230.

<sup>23</sup> There are many other cases to similar effect: see, e.g., *R. v. Gaisford* [1892] 1 QB 381; *R. v. Hendon Rural District Council ex parte Chorley* [1933] All ER Rep 20; *R. v. McKenzie* [1892] 2 QB 519.

<sup>24</sup> (1989) 1 Admin LR 33.

<sup>25</sup> For example, in *Brown v. DPP* [1956] 2 All ER 189 councillors who voted against their own pecuniary interests were convicted, on the ground that the offence is based on pecuniary *interest* and not pecuniary *advantage*.

<sup>26</sup> *R. v. Higher Education Funding Council ex parte Institute of Dental Surgery*

[1994] 1 All ER 651.

<sup>27</sup> 92/C/1955.

<sup>28</sup> See, p.133, above.

<sup>29</sup> See, Appendix I, below, for the text of the *National Code of Local Government Conduct*.

<sup>30</sup> *The Conduct of Local Authority Business* (Cmnd 9798).

<sup>31</sup> Sections 30 and 31.

<sup>32</sup> The Code was issued under cover of DoE Circular 8/90 and Welsh Office Circular 23/90. The Local Elections (Principal Areas) (Declaration of Office) Order 1990 prescribes the form of declaration of office to be made by newly-elected councillors, which includes the following: "I undertake to be guided by the National Code of Local Government Conduct in the performance of my functions [in the office of councillor]". See Appendix I for the full text of the Code.

<sup>33</sup> 87/B/789; McLeod, *Local Government Ombudsman: A Casebook*, p.98.

<sup>34</sup> 89/C/1909; (1991) 155 LG Rev 994.

<sup>35</sup> The local ombudsman did not address the relevance of the established legal concept that pensions are deferred payments of wages or salary.

<sup>36</sup> 88/C/1947.

<sup>37</sup> Cf. *Brown v. DPP*, n.25, for a case involving criminal liability for non-disclosure of interest.

The report makes the point that the reasons must also be minuted.

## **CHAPTER 6**

### **CONCLUSION**

#### **A: SIMILARITIES AND DIFFERENCES BETWEEN JUDICIAL REVIEW AND THE LOCAL OMBUDSMAN**

Despite fundamental differences in their origins, the processes of judicial review and ombudsmanship possess the common characteristic of seeking to assess the quality of the decision-making process without seeking to assess the quality of the ensuing decision,<sup>1</sup> although the courts are, of course, concerned solely with matters of law, whereas the local ombudsman is concerned with the broader area which may be termed *public morality*.<sup>2</sup>

Furthermore, both processes have a threshold of interest which a potential challenger or complainant must cross, and which exclude mere busybodies from interfering.<sup>3</sup> As a further hurdle to be overcome by applicants and complainants, the initiation of each process is subject to a relatively short time-limit, although in each context there is the possibility of extensions of time where the court or the local ombudsman, as the case may be, is satisfied that the interests of justice or fairness so require.<sup>4</sup>

Both processes provide what are essentially remedies of last resort. The courts' will refuse to entertain applications for judicial review in cases where the challenger could pursue remedies in respect of private law. Similarly, s.26 of, and Sch.V to, the Local Government Act 1974<sup>5</sup> exclude a variety of matters from the local ombudsman's jurisdiction, including what may generally be termed commercial matters (which will, of course, give rise to private law rights). It is worth noticing that, in practice, the local

ombudsman nevertheless does deal with complaints from tenants against local authorities *qua* landlords, despite the contractual basis of the relationship.

Both the courts and the local ombudsman take the view that regard should be had only to those considerations which are relevant to the subject-matter of the decision concerned.<sup>6</sup> In terms of their requirements as to the decision-making process itself, both the courts and the local ombudsman share the view that consistency is one of the elements of good decision-making, whilst also recognising that attitudes may change from time to time.<sup>7</sup> As far as the specific needs of natural justice or fairness are concerned, both the courts and the local ombudsman recognise the importance of people being given notice of allegations before it is decided whether those allegations have been substantiated, as well as the importance of decision-makers being free from bias. However, the courts generally<sup>8</sup> take a rather more relaxed attitude to bias than that which the local ombudsman adopts.<sup>9</sup>

The courts may require, and the local ombudsman may recommend, that reasons for decision should be given, but in practice the courts will do so only where it can be shown that the interests of fairness so require.<sup>10</sup>

Turning to the predictive value of judicial decisions and ombudsman's reports, there is clearly no express notion of self-bindingness on the part of the local ombudsman. However, there is no doubt that the formulation of principles of good administration is one product of the ombudsman process, and that the requirements of good decision-making processes include consistency. Since the true basis of the doctrine of precedent in the courts involves fidelity to principles rather than decisions,<sup>11</sup> there is a closer parallel between the two jurisdictions than may at first appear.



Despite the substantial similarities which exist between judicial review and the local ombudsman, there are also certain clear differences. In common with most court proceedings, applications for judicial review are heard in public, which means that it will be only in exceptional circumstances that the privacy of the applicant will be respected.<sup>12</sup> By way of contrast, the local ombudsman's investigations are conducted in private, and the general principle is that neither the complainant nor the other people involved will be identified.<sup>13</sup>

Another clear distinction between the two processes is that a complainant to the local ombudsman plays no part in, and has no financial responsibility for, the conduct of the investigation,<sup>14</sup> whereas an applicant for judicial review may incur significant expenditure.

There is also a difference between the courts and the local ombudsman in terms of the enforceability of their conclusions. Local ombudsman's reports have no enforcement machinery associated with them, beyond the psychological pressure which may result from Further Reports and the possibility of the local authority being required to publish a statement in the local press.<sup>15</sup> To apply the term *enforcement* to either of these outcomes would clearly be a significant overstatement. On the other hand, although court orders may be enforced, in practice the court may make no order, merely granting a declaration or simply relying on the judgment as a statement of the law.<sup>16</sup> In such cases, there is nothing to enforce, and therefore the distinction between the processes vanishes.

## **B: THE FUTURE**

Given the substantial overlap between judicial review and the local ombudsman process, there is clearly a case for implementing the recommendation of the *Woolf Report* that the relationship between the two should be more formalised.<sup>17</sup> However, this would almost certainly result in the local ombudsman developing into a sort of "small claims court".

Before adopting this recommendation, therefore, it would be highly desirable to consider the extent to which it might frustrate the local ombudsman's aspiration to continue to develop a culture of co-operation with local authorities, in order to promote the interests of the public at large.<sup>18</sup>

- <sup>1</sup> See, pp.2 and 13, respectively. Although allegations of *Wednesbury* unreasonableness or irrationality (in the context of the courts) and perversity or arbitrariness (in the context of the local ombudsman) necessarily involve some consideration of the quality of the decision.
- <sup>2</sup> See, p.14.
- <sup>3</sup> See, pp.43 and 45, respectively.
- <sup>4</sup> See, pp.49 and 51, respectively.
- <sup>5</sup> See, p.14.
- <sup>6</sup> See, pp.78-96.
- <sup>7</sup> See, esp., *R. v. Birmingham City Council ex parte Sheptonhurst Ltd* and the report on the investigation into a complaint against *Bolsover District Council*, at pp. 121 and 122, respectively.
- <sup>8</sup> With the possible exception of cases involving pecuniary interest - see, p.137.
- <sup>9</sup> See, pp.142-143.
- <sup>10</sup> See, pp.139 and 144, respectively.
- <sup>11</sup> See, p.62.
- <sup>12</sup> See, p.37.
- <sup>13</sup> See, p.38.
- <sup>14</sup> See, p.33.
- <sup>15</sup> See, p.38.
- <sup>16</sup> See, p.39, n.22.
- <sup>17</sup> See, p.35.



## **APPENDIX I**

### **THE NATIONAL CODE OF LOCAL GOVERNMENT CONDUCT**

#### ***The Law and standing orders***

1 Councillors hold office by virtue of the law, and must at all times act within the law. You should make sure that you are familiar with the rules of personal conduct which the law and standing orders require, and the guidance contained in this Code. It is your responsibility to make sure that what you do complies with these requirements and this guidance. You should regularly review your personal circumstances with this in mind, particularly when your circumstances change. You should not at any time advocate or encourage anything to the contrary. If in any doubt, seek advice from your council's appropriate senior officer or from your own legal adviser. In the end however, the decision and the responsibility are yours.

#### ***Public duty and private interest***

2 Your over-riding duty as a councillor is to the whole local community.

3 You have a special duty to your constituents, including those who did not vote for you.

4 Whilst you may be strongly influenced by the views of others, and of your party in particular, it is your responsibility alone to decide what view to take on any question which councillors have to decide.

5 If you have a private or personal interest in a question which councillors have to decide, you should never take any part in the decision, except in the special circumstances described below. Where such circumstances do permit you to participate, you should never let your interest influence the decision.

6 You should never do anything as a councillor which you would not justify to the public. Your conduct, and what the public believes about your conduct, will affect the reputation of your council, and of your party if you belong to one.

7 It is not enough to avoid actual impropriety. You should at all times avoid any occasion for suspicion and any appearance of the improper conduct.

***Disclosure of pecuniary and other interests***

8 The law makes specific provision requiring you to disclose both direct and indirect pecuniary interests (including those of a spouse with whom you are living) which you may have in any matter coming before the council, a committee or a sub-committee. It prohibits you from speaking or voting on that matter. Your council's standing orders may also require you to withdraw from the meeting while the matter is discussed. You must also by law declare certain pecuniary interests in the statutory register kept for this purpose. These requirements must be scrupulously observed at all times.

9 Interests which are not pecuniary can be just as important. You should not allow the impression to be created that you are, or may be, using your position to promote a private or personal interest, rather than forwarding the general public interest. Private and personal interests include those of your family and friends, as well as those arising through membership of, or association with, clubs, societies and other organisations such as the Freemasons, trade unions and voluntary bodies.

10 If you have a private or personal non-pecuniary interest in a matter arising at a local authority meeting, you should always disclose it, unless it is insignificant, or one which you share with other members of the public generally as a ratepayer, a community chargepayer or an inhabitant of the area.

11 Where you have declared such a private or personal interest, you should decide whether it is clear and substantial. If it is not, then you may continue to take part in the discussion of the matter and may vote on it. If, however, it is a clear and substantial interest, then (except in the special circumstances described below) you should never take any further part in the proceedings, and should always withdraw from the meeting whilst the matter is being considered. In deciding whether such an interest is clear and substantial, you should ask yourself whether members of the public, knowing the facts of the situation, would reasonably think that you *might* be influenced by it. If you think so, you should regard the interest as clear and substantial.

**12 In the following circumstances, but only in these circumstances, it can still be appropriate to speak, and in some cases to vote, in spite of the fact that you have declared such a clear and substantial private or personal interest:**

**(a) if your interest arises in your capacity as a member of a public body, you may speak and vote on matters concerning that body; for this purpose, a public body is one where, under the law governing declarations of pecuniary interests, membership of the body would not constitute an indirect pecuniary interest;**

**(b) if your interest arises from being appointed by your local authority as their representative on the managing committee, or other governing body, of a charity, voluntary body or other organization formed for a public purpose (and not for the personal benefit of the members), you may speak and vote on matters concerning that organization;**

**(c) if your interest arises from being a member of the managing committee, or other governing body of such an organization, but you were not appointed by your local authority as their representative; then you may speak on matters in which that organization has an interest; you should not vote on any matter directly affecting the finances or property of that organization, but you may vote on other matters in which the organization has an interest;**

**(d) if your interest arises from being an ordinary member or supporter of such an organization (and you are not a member of its managing committee or other governing body), then you may speak and vote on any matter in which the organization has an interest.**



## ***Dispensations***

13 Circumstances may arise where the work of your authority is affected because a number of councillors have personal interests (pecuniary or non-pecuniary) in some question.

14 In certain circumstances, you may be able to get a dispensation to speak, and also to vote, in spite of a pecuniary interest. Such dispensations are given under statute by the Secretary of State in the case of county, regional, islands, district and London borough councils, and (in England and Wales) by the district council in the case of town, parish and community councils.

15 In the case of non-pecuniary interests, there may be similar exceptions to the guidance contained in paragraphs 9 to 12 of this Code. In the circumstances below it may be open to you to decide that the work of the council requires you to continue to take part in a meeting which is discussing a matter in which you have a clear and substantial private or personal interest.

16 Before doing so, you should

- (a) take advice from the chairman of your local authority (if this is practicable) and from the appropriate senior officer of the authority as to whether the situation justifies such a step;
- (b) consider whether the public would regard your interest as so closely connected with the matter in question that you could not be expected to put your own interest out of your mind (for example, the matter might concern a decision by the council affecting a

close relative); if you think that they would, you should never decide to take part in a discussion of, or a vote on, the matter in question; and

(c) consider any guidance which your council has issued on this matter.

17 The circumstances in which (after such consultation and consideration) you may decide to speak and vote on a matter in which you have a clear and substantial private or personal non-pecuniary interest are *if, but only if*:

(a) at least half the council or committee would otherwise be required to withdraw from consideration of the business because they have a personal interest; or

(b) your withdrawal, together with that of any other members of the council or committee who may also be required to withdraw from consideration of the business because of a personal interest, would upset the elected party balance of the council or committee to such an extent that the decision is likely to be affected.

18 If you decide that you should speak or vote, notwithstanding a clear and substantial personal or private non-pecuniary interest, you should say at the meeting, before the matter is considered, that you have taken such a decision, and why.

19 The guidance set out in paragraphs 15-18 above also applies to sub-committees. However if the sub-committee is very small, or if a large proportion of members declare a personal

interest, it will usually be more appropriate for the matter to be referred to the parent committee.

### ***Disclosure in other dealings***

20 You should always apply the principles about the disclosure of interests to your dealings with council officers, and to your unofficial relations with other councillors (at party group meetings, or other information occasion) no less scrupulously than at formal meetings of the council, committees and sub-committees.

### ***Membership of committees and sub-committees***

21 You, or some firm or body with which you are personally connected, may have professional, business or other personal interest within the area for which the council are responsible. Such interest may be substantial and closely related to the work of one or more of the council's committees or sub-committees. For example, the firm or body may be concerned with planning, developing land, council housing, personnel matters or the letting of contracts for supplies, services or works. You should not seek, or accept, membership of any such committee or sub-committee if that would involve you in disclosing an interest so often that you could be of little value to the committee or sub-committee, or if it would be likely to weaken public confidence in the duty of the committee or sub-committee to work solely in the general public interest.

### ***Leadership and Chairmanship***

22 You should not seek, or accept, the leadership of the council if you, or any body with which you are associated, has a substantial financial interest in, or is closely related to, the business or affairs of the council. Likewise, you should not accept the chairmanship of a committee or sub-committee if you have a similar interest in the business of the committee or sub-committee.

### ***Councillors and officers***

23 Both councillors and officers are servants of the public, and they are indispensable to one another. But their responsibilities are distinct. Councillors are responsible to the electorate and serve only so long as their term of office lasts. Officers are responsible to the council. Their job is to give advice to councillors and the council, and to carry out the council's work under the direction and control of the council, their committees and sub-committees.

24 Mutual respect between councillors and officers is essential to good local government. Close personal familiarity between individual councillors and officers can damage this relationship and prove embarrassing to other councillors and officers.

25 The law and standing orders lay down rules for the appointment, discipline and dismissal of staff. You must ensure that you observe these scrupulously at all times. Special rules apply to the appointment of assistants to political groups. In all other circumstances, if you are called upon to take part in appointing an officer, the only question you should consider is which candidate would best serve the whole council. You should not let your political or personal

preferences influence your judgment. You should not canvass the support of colleagues for any candidate and you should resist any attempt by others to canvass yours.

### ***Use of confidential and private information***

26 As a councillor or a committee or sub-committee member, you necessarily acquire much information that has not yet been made public and is still confidential. It is a betrayal of trust to breach such confidences. You should never disclose or use confidential information for the personal advantage of yourself or of anyone known to you, or to the disadvantage or the discredit of the council or anyone else.

### ***Gifts and hospitality***

27 You should treat with extreme caution any offer or gift, favour or hospitality that is made to you personally. The person or organization making the offer may be doing, or seeking to do, business with the council, or may be applying to the council for planning permission or some other kind of decision.

28 There are no hard or fast rules about the acceptance or refusal of hospitality or tokens of goodwill. For example, working lunches may be a proper way of doing business, provided that they are approved by the local authority and that no extravagance is involved. Likewise, it may be reasonable for a member to represent the council at a social function or event organized by outside persons or bodies.

29 You are personally responsible for all decisions connected with the acceptance or offer of gifts or hospitality and for avoiding the risk of damage to public confidence in local government. The offer or receipt of gifts or invitations should always be reported to the appropriate senior officer of the council.

### ***Expenses and allowances***

30 There are rules enabling you to claim expenses and allowances in connection with your duties as a councillor or a committee or sub-committee member. These rules must be scrupulously observed.

### ***Dealings with the council***

31 You may have dealings with the council on a personal level, for instance as a ratepayer or community chargepayer, as a tenant, or as an applicant for a grant or a planning permission. You should never seek or accept preferential treatment in those dealings because of your position as a councillor or a committee or sub-committee member. You should also avoid placing yourself in a position that could lead the public to think that you are receiving preferential treatment: for instance, by being in substantial arrears to the council, or by using your position to discuss a planning application personally with officers when other members of the public would not have the opportunity to do so. Likewise, you should never use your position as a councillor or a committee or sub-committee member to seek preferential treatment for friends or relatives, or any firm or body with which you are personally connected.

### ***Use of council facilities***

32 You should always make sure that any facilities (such as transport, stationery, or secretarial services) provided by the council for your use in your duties as a councillor or a committee or sub-committee member are used strictly for those duties and for no other purpose.

### ***Appointments to other bodies***

33 You may be appointed or nominated by your council as a member of another body or organization - for instance, to a joint authority or a voluntary organization. You should always observe this Code in carrying out your duties on that body in the same way you would with your own authority.

## **APPENDIX II**

### **TABLE OF OUTCOMES OF FURTHER REPORTS**

**(COMPILED FROM THE ANNUAL REPORTS FOR 1989-90 TO 1995-96)**

**KEY:** S = Local Ombudsman Satisfied;      US = Local Ombudsman Unsatisfied;

AS = Satisfaction Awaited;

LAPS = Local Authority Published

Statement in Local Press;

LOPS = Local Ombudsman Published Statement in Local Press.

	<b>S</b>	<b>US</b>	<b>AS</b>	<b>LAST</b>	<b>LOST</b>
<b>1989-90</b>	3	12	8		
<b>1990-91</b>	8	15	11		
<b>1991-92</b>	9	3	15		
<b>1992-93</b>	2	4	9	2	
<b>1993-94</b>	8	3	8	2	9
<b>1994-95</b>	1	3	17	1	4
<b>1995-96</b>	2	2	6	2	4



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